In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OPINIONS BELOW

The opinion of the United States Court of Appeals, Fifth Circuit, not yet reported, appears in the appendix hereto as "A. 1-18." The opinion of the District Court, Middle District of Florida, Tampa Division, as "A. 19-27."

JURISDICTION

The Court of Appeals, Fifth Circuit, entered its judgment on February 25, 1976. It denied a timely Petition for Rehearing *en banc* on March 22, 1976, (A. 31) and this Petition for Certiorari was filed within 90 days of this date. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. Whether the failure to question the admissibility of an out-of-court statement, at or before trial, bars a state prisoner from presenting his voluntariness claim in a federal habeas proceeding where such failure constitutes a waiver under state practice.

2. Whether *Jackson v. Denno*, 378 U.S. 368 (1964), mandates a voluntariness hearing where the admissibility of the confession or admission is not challenged.

AUTHORITIES INVOLVED

Florida Rule of Criminal Procedure 3.190(i), 1972 (A. 30).

STATEMENT OF THE CASE

Florida charged John Sykes with murder in the second degree. The jury found him guilty of third degree murder. At trial, certain out-of-court statements made by him were introduced in evidence. His counsel never challenged the admissibility of the statements, either at or before trial. This constituted a waiver under Florida Rule of Criminal Procedure 3.190 (i), 1972 (A. 30). *Blatch v. State*, 216 So.2d 261 (Fla.App. 1968), *Thomas v. State*, 249 So.2d 510 (Fla.App. 1971). Sykes never raised the admissibility of the statements on his appeal in state court.[1]

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1. After filing his habeas petition, Sykes executed a written waiver waiving any contentions that his state trial or appellate counsel was incompetent (A. 28-29).

Subsequently, John Sykes filed a Petition for Writ of Habeas Corpus in the District Court challenging the voluntariness of his statements. Sykes contended he had been too intoxicated to understand his "*Miranda* Rights". The District Court held an evidentiary hearing, but Sykes declined to present any testimony, relying entirely on the state trial record. Florida contended that Sykes had waived the right to present this issue because of his counsel's failure to challenge the admissibility of the statements.

The District Court ruled Sykes was not bound by his counsel's procedural default and entered an interlocutory order giving Florida 90 days within which to conduct a *Jackson v. Denno*, 378 U.S. 368 (1964), voluntariness hearing (A. 25-26). Florida sought permission and was granted

leave to file an interlocutory appeal pursuant to 28 U.S.C. §1292(b) and Rule 5 of the Federal Appellate Rules. The Fifth Circuit affirmed, holding that Sykes' procedural default did not constitute a waiver even though Florida's procedural rule served a "presumably" legitimate state interest and even though Sykes never alleged or presented evidence of any cause excusing the failure to object.

REASONS FOR GRANTING WRIT

1. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING FEDERAL QUESTIONS INVOLVED IN THOUSANDS OF HABEAS CORPUS PETITIONS FILED BY STATE PRISONERS.

This Court and other circuits have recognized that there is a legitimate interest in the promulgation of procedural rules to insure the timely presentation of issues. *Davis v. United States*, 411 U.S.

233 (1973), *Henry v. Mississippi*, 379 U.S. 443 (1965), *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973).

The lower Court recognized that Florida's procedural rule serves a legitimate state interest. It refused, nevertheless, to give effect to the rule. In short, it destroyed the rule. The decision below is erroneous and presents an important question of Federal Constitutional law. It is important that this Court clarify once and for all whether only federal prisoners are bound by procedural rules or whether the respective states are also entitled to insist on the enforcement of their procedural rules.

The issues are recurring. Since *Fay v. Noia*, 372 U.S. 391 (1963), it has remained unclear to what extent and under what circumstances the failure to utilize available state procedures will preclude subsequent

collateral attack.

The decision of the Fifth Circuit in the instant case muddles the water even more.

2. THE DECISION CONFLICTS WITH THE DECISION OF THIS COURT AND OF OTHER COURTS OF APPEAL ON WHETHER A TIMELY OBJECTION AS REQUIRED BY A STATE PROCEDURAL RULE MAY CONSTITUTE A WAIVER OF A CONSTITUTIONAL CLAIM.

As long as a procedural rule serves a legitimate interest, failure to timely raise a constitutional issue, as required by the rule, constitutes a waiver and precludes consideration of the issue in collateral proceedings, except where cause excusing the waiver is shown. *Henry v. Mississippi*, 379 U.S. 443 (1965), *Davis v. United States*, 411 U.S. 233 (1973).

The lower Court refused to recognize this principle and held that even where a

state criminal defendant does not challenge the admissibility of a statement, as required by a state procedural rule, he is not precluded from thereafter collaterally challenging its admissibility in a federal habeas proceeding.

The holding is in direct conflict with that of the Seventh Circuit in *United States ex rel Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973). There, in a habeas proceeding filed by a state prisoner, the Court applied a *Davis, supra*, procedural waiver to the admissibility of an in custody statement.

A similar holding by the Ninth Circuit appears in *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1969). In that case a habeas petitioner contended that certain statements made by him were improperly allowed in evidence because he was intoxicated when he made them. The Court held that

trial counsel's failure to object constituted a waiver of the issue.

3. THE DECISION CONFLICTS WITH THE DECISIONS OF THIS COURT ON WHETHER *Jackson v. Denno*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE VOLUNTARINESS OF THE CONFESSION OR ADMISSION IS NOT CHALLENGED.

In order to justify its erroneous holding that Sykes was not bound by Florida's procedural rule[2] the lower Court compounded the error by holding that *Jackson v. Denno, supra*, mandates a voluntariness hearing even where a confession or admission is not challenged.

Jackson, v. Denno, supra, does not so mandate. The precepts of *Jackson* are satisfied as long as a forum is provided

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2. While at the same time holding that it ". . . presumably . . . serve[s] a legitimate state interest." (A. 13).

whereby a defendant challenging the voluntariness of a confession can have the issue resolved by the Court as a matter of law. Florida provides such a forum through Criminal Procedure Rule 3.190(i) 1972 (A. 30).

That *Jackson* does not so mandate is clear, not only from the opinion itself, but from subsequent decisions of this Court such as *Lego v. Twomey*, 404 U.S. 477 (1972), where in referring to *Jackson* this Court said:

> "in 1964 this Court held that a criminal defendant *who challenges* the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids. . . . "
>
> [Text at 478, emphasis supplied]

and *Pinto v. Pierce*, 389 U.S. 31 (1967), where this Court also said:

> ". . . a defendant's constitutional rights are violated when his *challenged confession* is introduced without a determination by the trial judge of its voluntariness after an adequate hearing . . . . "

[Text at 32, emphasis supplied]

In support of its decision, the lower court relies on *Sims v. Georgia*, 385 U.S. 538 (1967). But there the confession was specifically challenged and the issue was whether the Georgia courts afforded a fair and reliable procedure for determining its voluntariness - not one of a *sua sponte* obligation on the part of the trail court to determine voluntariness.

CONCLUSION

For these reasons, Petitioner respectfully urges this Court to grant Certiorari and reverse the holding of the Court of

Appeals in and for the Fifth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 27 day of April, 1976, I served three copies of the Petition for Writ of Certiorari on William F. Casler, Esquire, Counsel for Respondent, 6795 Gulf Boulevard, St. Petersburg, Florida 33706, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

Louie L. WAINWRIGHT, Director,
Division of Corrections,
Petitioner-Appellant,

v.

John SYKES, Respondent-Appellee.

No. 75-1781.

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1976.

State appealed from an interlocutory order of the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., in a habeas corpus case requiring it to conduct an evidentiary hearing to supplement the record and providing, in the alternative, that the Court would determine the issues on the state record as transmitted, if a supplemental evidentiary hearing were not held. The Court of Appeals, Simpson, Circuit Judge, held that if the trial judge had questioned the admissibility of statements made by defendant at the time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might now foreclose him, on petition for

federal habeas relief, from bringing additional or subsequent arguments regarding the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights.

Affirmed.

1. Criminal Law 412.2(5)

Any incriminating statement made by the defendant absent a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

2. Criminal Law 412.2(5)

A defendant might be too drunk to give a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself and, in such a case, out-of-court statements made by him would be inadmissible at trial as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

3. Criminal Law 414

Before an admission or confession may be introduced in evidence against a defendant, it is incumbent on the trial judge to determine the voluntariness of the statements involved, and the defend-

ant's knowing and intelligent waiver of his constitutional rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

4. Constitutional Law 266.1(5)

As a matter of procedural due process, a defendant is entitled to a hearing on the issue of the voluntariness of an admission or confession made by him.

5. Criminal Law 1144.12

Waiver of Miranda rights will not be presumed from a silent record.

6. Criminal Law 671

Burden is on the state to secure a hearing outside the presence of the jury, not on the defendant to demand it, to determine the voluntariness of any statements made by the defendant and proposed to be used as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

7. Habeas Corpus 25.1(8)

If trial judge had questioned the admissibility of statements made by defendant at time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might foreclose him, on petition for federal habeas relief, from bringing additional or subsequent arguments regard-

ing the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

Appeal from the United States District Court for the Middle District of Florida.

Before GEWIN, BELL* and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The respondent below, Wainwright, (appellant, or occasionally, "the State"), appeals from an interlocutory order of the district court in a state habeas corpus case. That order required the state to conduct an evidentiary hearing to supplement the record before the district court, and provided that in the alternative, if such a hearing is not held, the district court will determine the issues on the state record as transmitted. The effect of the order was stayed for 90 days to permit this appeal. At issue is the petitioner-appellee's contention that statements made by him at the time of his state arrest were unconstitutionally

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.

used as evidence against him at trial, because, conceding that he received his *Miranda*[1] warnings as testified by sheriff's deputies, he was drunk at the time of his arrest and the making of the statements used, and thus incapable of a knowing waiver of the underlying constitutional rights involved. The respondent counters that appellee Sykes' failure to object to the introduction in evidence of the out of court statements at or before trial, required by Rule 3.190(i), Fla.R. Crim.Proc. 1972[2], waived his opportunity to challenge the voluntariness of the incriminating statements.

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1. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

2. (i) *Motion to Suppress a Confession or Admissions Illegally Obtained.*

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Appellee was arrested and charged with second degree murder. On June 5, 1972, he was tried before a jury, and convicted of third degree murder, Fla. Stat. 782.04, in a Florida court. The conviction was affirmed on direct appeal. Subsequently, he unsuccessfully sought habeas corpus relief in the state courts. Thereafter he sought habeas corpus relief in the court below. In an unpublished order of January 23, 1975, the district court found that appellee's trial transcript and the state record was too meager a basis for findings as to the voluntariness of the waiver of the *Miranda* rights involved. Consequently, the court ordered that a *Jackson v. Denno* [3] type evidentiary hearing be held in the Florida court to determine the voluntariness of the out of court statements used as evidence against Sykes. The court later modified its order to permit an interlocutory appeal pursuant to Title 28, U.S.C. § 1292(b), and we accepted the appeal.

At issue then are two distinct waiver problems: (1) did Sykes knowingly and voluntarily waive his *Miranda* rights when he made inculpatory statements at the time of his arrest? (2) did appellee, by failing to object to the introduction of the statements into evidence, as provided by procedural State law, waive the right to bring this objection on appeal or in subsequent proceedings? The purpose of the evidentiary hearing the district court ordered is to determine the factual basis of the underlying waiver issue, or sub-

3. 1964, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908.

stantive issue, to determine if Sykes was in fact so drunk he could not understand his *Miranda* rights, and thus could not knowingly waive them.[4] Our inquiry, in determining the propriety of the district court's order, must focus on the second, or procedural, waiver.

I. NATURE OF THE RIGHT

[1,2] Both appellee and the state recognize that any incriminating statement made by a defendant absent a knowing and intelligent waiver by him of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16

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4. The trial transcript shows affirmatively that Sykes was advised of his rights at the jailhouse. The conversation in which Sykes made incriminating statements took place, however, at the scene of the shooting, shortly after the police had arrived. The record is not clear as to whether Sykes was informed of his *Miranda* rights before these initial statements were given. These initial inculpatory statements made by Sykes, while in the custody of the police, were inconsistent with Sykes' self defense theory at trial. The prosecution called sheriff's deputies who testified to Sykes' statements during the case in chief. The testimony of three separate witnesses indicates Sykes had been drinking at the time he made those statements, and raises the possibility that even if Sykes had been read his rights, he might not have been able to comprehend them, and might therefore have been unable to knowingly waive them.

L.Ed.2d 694. The state does not appear to object to the proposition, in the abstract, that a defendant might be too drunk to give such a knowing and intelligent waiver, and that, in such a case, out of court statements made by him would be inadmissible at trial as evidence against him.[5]

The Supreme Court in *Miranda*, in recognition of the importance of the defendant's Fifth and Sixth Amendment rights, stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisite to the admissibility of any statement made by a defendant". 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725. The state asserts that the protections and prerequisites *Miranda* set out as necessary to the introduction of a defendant's out of court statements might themselves be waived by the failure of the defendant to object to their introduction.

[3-6] Before an admission or confession may be introduced into evidence against a defendant, it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelli-

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5. Cf. *United States v. Taylor*, 5 Cir. 1975, 508 F.2d 761, 763: "The evidence must show the defendant was so affected as to make the statement, after appropriate warnings, unreliable or involuntary". [regarding the admissibility of statements made by a defendant while under the influence of drugs].

gent waiver of his constitutional rights. *Johnson v. Zerbst*, 1938, 304 U.S. 458, 88 S.Ct. 1019, 82 L.Ed. 1461. A defendant is entitled to a hearing on the issue of voluntariness as a matter of procedural due process. *Jackson v. Denno*, supra. The rule set out in *Jackson v. Denno* is that "a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given." *Sims v. Georgia*, 1967, 385 U.S. 538, 543-544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598, "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity". *Id.*, 385 U.S. at 544, 87 S.Ct. at 643, 17 L.Ed.2d at 598.[6] Long before *Jackson v. Denno* the Florida practice was to require the trial judge to hold a hearing outside the presence of the jury to determine the voluntariness of any statements by the defendant proposed to be used as evidence against him.[7] The bur-

6. The waiver of *Miranda* rights will not be presumed from a silent record. *Miranda v. Arizona*, 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724, citing *Carnley v. Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70.

7. "While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relieve the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting

den is on the state to secure this prima facie determination of voluntariness, not upon the defendant to demand it. *McDole v. State*, Fla. 1973, 283 So.2d 553; *Reddish v. State*, Fla.1964, 167 So.2d 858; *Young v. State*, Fla.1962, 140 So.2d 97; *Smith v. State*, 3rd Fla.D.C.A.1974, 288 So.2d 522; *Dodd v. State*, 4th Fla.D.C.A. 1970, 232 So.2d 235.

II. WAIVER

Appellee argues that not only did the state fail to carry its burden in showing affirmatively, on the record, that the statements introduced were voluntarily made, but that the waiver principles enunciated in *Fay v. Noia*[8] make it plain that constitutional rights of such

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them. It is a duty which the law imposes upon the court in order that the prisoner's constitutional right to a fair and impartial trial may be protected and preserved, and this right should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by the respective counsel and won or lost according to their skill in playing the game according to the rules." *Stiner v. State*, 1919, 78 Fla. 647, 83 So. 565.

8. "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

fundamental importance as those considered here may only be waived by the defendant himself, deliberately, and not by his attorney without his personal knowledge, or through a procedural forfeit. The state, however, recites to us a

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"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst* — 'an intentional relinquishment or abandonment of a known right or privilege' — furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits —though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the

litany of cases purporting to show that in instances such as this a purely procedural waiver would bind the defendant, notwithstanding the fact that he had no personal knowledge of the rights waived.

The state sees this as a case controlled by *Henry v. Mississippi*, 1965, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408, which held that it is up to the federal courts to determine whether the enforcement of a state procedural rule serves a legitimate interest so as to preclude a state prisoner from raising questions of constitutional right by federal habeas corpus. Florida Rule of Criminal Procedure 3.190(i)[9] is a contemporaneous objection rule analogous to that considered in *Henry*. Their function is the same; "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence." *Henry v. Mississippi*, supra, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. The facts of this case, however, are not such as to require that federal courts, from any principle of comity, refrain from determining the underlying constitutional claim of Sykes.

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question by federal courts on habeas, for waiver affecting federal rights is a federal question." (citations omitted throughout). *Fay v. Noia*, 1963, 372 U.S. 391, 438-439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837, 869.

9. See Note 2, supra.

Henry dealt with the admissibility of a police officer's testimony as to evidence which had been illegally obtained. Counsel for the defendant in that case did not object at trial to the testimony, and therefore did not comply with the state's contemporaneous objection rule. The Court remanded the case to the state court to determine whether the defendant was "to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of illegally seized evidence." *Id.*, 408 U.S. at 446, 85 S.Ct. at 566, 13 L.Ed.2d at 412. The Supreme Court stated that there was no question but "that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.*, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. As already noted, the contemporaneous objection rule considered in *Henry*, and presumably the one at bar, serve a legitimate state interest. The Supreme Court did not find a waiver in *Henry*, but remanded the case to the state courts, because the Court thought a motion for a directed verdict, made at the close of the State's evidence might have vindicated the state's interest in having the rule followed by alerting the trial judge to the objections of the defendant, and therefore the rule might have been reduced to mere form. The court felt this determination, and other evidentiary questions relating to whether or not error in admitting the evidence was subsequently cured, or whether the defense had engaged in a

deliberate by-pass of the Mississippi rule, would be more properly decided in the state courts. As to this later possibility, the Court opined that a deliberate by-pass of the Mississippi procedural rule would constitute a waiver binding on the defendant.

In *Davis v. United States*, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216, the Supreme Court held the failure of a federal defendant to assert, before trial, a claim of unconstitutional racial discrimination in the composition of the grand jury which had indicted him, as provided for by Rule 12(b)(2) of the Federal Rules of Criminal Procedure, constituted a waiver of his rights. The waiver foreclosed habeas corpus consideration of the issues raised. A major tenet of the *Davis* decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition.[10] In *Newman v. Henderson*, 5 Cir. 1974, 496 F.2d 896, we held, in a habeas corpus action brought by a state prisoner to challenge the racial composition of the grand jury which had indicted him, that absent a showing of actual prejudice, the principles of *Davis* would

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10. Rule 12(b)(2), F.R.Crim.P., provides for the waiver of claims to defects in the institution of criminal proceedings if not asserted before trial. The defendant may be relieved of this waiver "for cause shown". In *Shotwell Mfg. Co. v. United States*, 1963, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357, and in *Davis*, supra, the Court indicated actual prejudice would be a factor in "cause shown".

bind the petitioner to a waiver predicated upon state procedural requirements. However in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent.

The state pursues its claim of waiver by citing *Winters v. Cook*, 5 Cir. 1973, 489 F.2d 174 (En Banc). In that case we held that the defendant had waived his right, by his guilty plea to a murder charge, to subsequently challenge by writ of habeas corpus the racial composition of the grand jury that had indicted him. The record of that case indicated Winter's attorney fully considered the possibility of raising constitutional objections on behalf of his client, but rejected this option for tactical reasons in favor of a plea of guilty (which the state was induced to accept by the "pry-bar" effect of the threat of the possible constitutional objection) which avoided the possibility of a death sentence. The court held that despite the fact the defendant had not been consulted with on the waiver of the grand jury issue, he was bound by that waiver. The court held however, as had the Supreme Court in *Henry v. Mississippi*, that some "exceptional" circumstances would preclude the waiver by counsel of certain rights without the defendant's knowledge. We are confident that *Miranda* rights, in a situation such as this, might constitute such "exceptional" circumstances, see Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1111 n. 102 (1970), but refrain from basing our holding on this rationale alone.

In a case somewhat similar, factually, to this one, the Seventh Circuit in *United States ex rel. Allum v. Twomey*, 7 Cir. 1970, 484 F.2d 740, considered the juxtaposition of *Fay v. Noia* and *Davis v. United States* in relation to a state prisoner's assertion that he did not "knowingly and deliberately" waive his rights to object to the admissibility of an in custody statement made by him. The court found that the state defendant should be held to a waiver by his failure to object even though it was not a personal waiver, but one attributable to his attorney. In evaluating the facts it found persuasive in reaching this conclusion, the court found "there was a reasonable tactical basis for counsel's failure to object to the statement." *Id.*, at 745.

The failure to object in this case cannot be dismissed as a trial tactic, and thus a deliberate by-pass. Aside from the state's bare allegation that such was the case, without the suggestion of the slighted tactical benefit, there is nothing here present upon which to speculate that the defense's failure to object to the introduction of Sykes' statement was a strategic decision. We can find no possible advantage which the defense might have gained, or thought they might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190(i).

III. CONCLUSION

The burden is on the state to introduce a proper predicate for the admission of a confession or statement against interest

into evidence. The trial judge, before receiving the admissions or confessions of a defendant must hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made. *Jackson v. Denno*, supra. This is a pre-requisite to the introduction of the evidence; and the opportunity to have such a hearing is a pre-requisite to any assertion of waiver because of the defendant's failure to object.

[7] The state's interest then, if not to be reduced to mere form, in having Florida Criminal Procedure Rule 3.190(i) followed, must be co-extensive with the established burden on the state. If the trial judge had questioned the admissibility of the statements, required the prosecution to show they were admissible, appellee would have been on notice as to the waiver of his rights, and Rule 3.190(i) might now foreclose him from bringing additional or subsequent arguments regarding the admissibility of the statement in question. Because the trial afforded appellee in this case did not conform to procedural requirements, long established, that the trial judge must assure himself of the admissibility of the criminal defendant's statements, we refuse to construe Rule 3.190(i) as foreclosing Sykes' opportunity to challenge the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights.

The actual prejudice to appellee stemming from enforcing a waiver of *Miranda* rights, as well as the total absence of any indication that his failure to object

is attributable to trial tactics, persuade us that the district court should be affirmed. Justice requires it.

The state will have ninety days from the time our mandate issues to conduct an evidentiary hearing to determine whether Sykes was properly apprised of his *Miranda* rights, and understood and knowingly waived those rights at the time he made the incriminating statements used against him. If the state does not initiate a hearing before the expiration of that time, the district court may determine the issues on the record as transmitted.

The order appealed from is in all respects

Affirmed.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, Petitioner,	)	
vs.	)	No. 73-316-Civ.T.H.
LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, Respondent.	)	

ORDER

On April 25, 1973, Petitioner, a state prisoner, filed with the Clerk his pro se petition for habeas corpus relief pursuant to 28 U.S.C. §2254. In accordance with a General Order of Assignment, the petition was referred to the United States Magistrate for his Report and Recommendation. The Magistrate, on June 26, 1973, authorized the commencement of the action without prepayment of costs or fees; and, on August 14, 1973, he appointed counsel for Petitioner pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Issue was then joined, and counsel presented briefs concerning the legal and factual issues involved. Thereafter, on August 23, 1974, the

Magistrate entered his Report and Recommendation, recommending that an evidentiary hearing be conducted. See, Wingo v. Wedding, ___ U.S. ___, 94 S.Ct. 2842 (1974).

Accordingly, the Court ordered the filing of a pre-evidentiary hearing stipulation, ordered the production of Petitioner in Tampa, and scheduled a pre-evidentiary hearing and evidentiary hearing. Pursuant to stipulation of counsel, the pre-evidentiary hearing was cancelled and the cause came on for evidentiary hearing on January 9, 1975.

While the file in this cause is sketchy at best, counsel for Petitioner summarized the undisputed facts of the case at the January 9 hearing:

In 1972, Petitioner was charged with second degree murder in the Twelfth Judicial Circuit Court, DeSoto County, Florida. Following a jury trial, Petitioner was convicted of third degree murder and was sentenced to a term of ten years incarceration. An appeal ensued, and his conviction was affirmed by the Second District Court of Appeal. Certiorari was denied by the Florida Supreme Court. In addition, a motion to vacate, set aside or correct sentence addressed to the trial court pursuant to Rule 3.850, Fla. R.Crim.P., was denied, as were petitions for writ of habeas corpus filed in the Second District Court of Appeal and the Florida Supreme Court.

Petitioner now presents two claims to this Court. First, Petitioner asserts

that certain statements made by him to sheriff's deputies were improperly admitted at trial since Petitioner was intoxicated at the time he made them and, therefore, was incapable of understanding the Miranda warnings which were supposedly given. Second, Petitioner asserts that improper instructions were given to the trial jury. With respect to these claims, counsel for Petitioner stated at the January 9 hearing that Petitioner would stand on the trial transcript made in state court and the official documents and papers in the court file. He called no witnesses. Likewise, Respondent presented no additional testimony or evidence.

I. MIRANDA CLAIM

Dealing first with the Miranda claim, it is undisputed that counsel for Petitioner made no motion to suppress the statements prior to the trial in state court, made no objection to the introduction of them at trial, and did not assign as error on appeal the fact that the statements had been received in evidence. However, Petitioner did present his argument to the state courts in his post-conviction motions and petitions, and the Court finds that Petitioner has exhausted his state remedies as to this claim as required by 28 U.S.C. § 2254(b).

Respondent argues that Petitioner's failure to raise this issue in the state courts by motion to suppress, objection, or appeal constitutes waiver of his claim,

and he should not be heard to raise it in this Court. The waiver issue has been the subject of much discussion in the authorities, and the law is now fairly settled. In exceptional circumstances, some strategic decisions at trial can preclude an accused from later asserting a constitutional claim on federal habeas corpus. Henry v. Mississippi, 379 U.S. 443, 451-452, 85 S.Ct. 564, 569 (1965); Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849 (1963); Winters v. Cook, 489 F.2d 174, 176-180 (5th Cir. 1973). Other than the bald assertion, however, Respondent has pointed to nothing in the record and has adduced no evidence here that would demonstrate the kind of exceptional circumstance recognized in the authorities as constituting a waiver. Clearly, therefore, it would be error for the Court to give effect to Respondent's contention on this record. See, e.g., Collier v. Estelle, ___ F.2d ___ (5th Cir. 1975) [slip op. P. 2312, No. 74-2474, Jan. 9, 1975]; Bailey v. Alabama, ___ F.2d ___ (5th Cir. 1975) [slip op. p. 2159, No. 74-2104, Jan 6, 1975].

Turning to the merits of Petitioner's claim that he was intoxicated and incapable of understanding the Miranda warnings given him, the authorities are clear that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), requires that certain warnings or cautions be given to a suspect in a custodial situation and that the suspect fully understand the substance of his constitutional rights as explained in those warnings.

Thus, it is said in the fountainhead case itself:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . . . This Court has always set high standards of proof for the waiver of constitutional rights,. . ., and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders."

Miranda v. Arizona, supra, at 475, 86 S.Ct. at 1628 [citations omitted].

Consequently, the issue presently before the Court, as it is in all habeas cases presenting the Miranda issue, is: has the prosecution sustained its "heavy burden" of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and under-

standingly decline to exercise them? Hill v. Whealon, 490 F.2d 629, 630 (6th Cir. 1974); Hughes v. Swenson, 452 F.2d 866, 868 (8th Cir. 1971). Cf. Hamilton v. Smith, 450 F.2d 922, 923 (5th Cir. 1971); Goodwin v. Smith, 439 F.2d 1180, 1182 (5th Cir. 1971). As to that issue, the only evidence before the Court is that developed in the state trial itself, neither party having presented any testimony or evidence at the January 9 hearing.

The transcript of the proceedings and testimony taken before the Hon. John D. Justice, Circuit Judge, at Petitioner's June 5, 1972 trial is markedly void of the facts and information required by this Court to make a determination of the issue now before it.* The witness, Neil Tyree, testified that he remembered hearing someone advise Petitioner of his "constitutional rights" at the scene of the homicide, Transcript at 16 and 23, but he further testified that he did not remember who it was who gave Petitioner his "rights," Transcript at 23. No testimony at all was given by this witness concerning the substance of any warnings given Petitioner or Petitioner's

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* Under no circumstances should this observation be taken as a criticism of the trial judge. He was given no opportunity to pass on the matter. It should also be observed that Petitioner has withdrawn his claim of ineffective assistance of counsel.

ability to understand any such warnings. The witness did testify, however, that Petitioner smelled of alcohol, Transcript at 19 and 24. Another witness, Gus Grethan, a DeSoto County Deputy Sheriff, testified that he and G. H. Skinner, also a Deputy Sheriff, read Petitioner's rights to him from a card later at the jail, Transcript at 35, and that, at the time the officers arrived at the scene of the homicide, Petitioner was sufficiently intoxicated to be arrested for being drunk, Transcript at 39. Again, no testimony at all was given by this witness, or by any other, concerning the substance of any warnings given Petitioner or Petitioner's ability to understand any such warnings. Thus, were it proper for this Court to directly pass upon the sufficiency of the evidence adduced at trial to sustain the prosecution's "heavy burden," the Court would be constrained to hold that the evidence was not sufficient. However, such a determination at this point would be improper.

A review of the state court proceedings at trial, on appeal, and on post-trial collateral attack reveals that at no time has Petitioner received a hearing on the issue of the voluntariness of his statements pursuant to Jackson v. Denno, 378 U.S. 368, 391, 84 S.Ct. 1774, 1778 (1964). Jackson requires such a hearing; and, further, it requires that the hearing be held in the state courts, rather than in federal court on habeas corpus. Jackson v. Denno, supra, at 393, 84 S.Ct. at 1789-1790; Sigler v. Parker, 396 U.S. 482, 484, 90 S.Ct. 667, 669 (1970). Accordingly, this

Court will stay proceedings in this cause for a period of 90 days from the date hereof to allow the state courts a reasonable opportunity to afford Petitioner a hearing on the voluntariness issue. At the expiration of that period of time, the Court will continue to stay this proceeding if a hearing is then pending in state court. If one is not, the Court will then be required to determine whether or not the state carried its burden on the basis of the record as it presently exists.

Before leaving Petitioner's Miranda claim, two additional comments need to be made. First, no distinction can be drawn between the Jackson case, which deals with confessions, and the subsequent Miranda case, which deals with mere statements. For Miranda makes it clear that "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." 384 U.S. at 476, 86 S.Ct. at 1629.

Second, the fact that 28 U.S.C. § 2254(d) places the burden upon Petitioner in this proceeding to show by clear and convincing evidence that the state court's determination was erroneous, does not assist Respondent in these circumstances. By pointing to the transcript of the state trial, Petitioner has succeeded in demonstrating that the merits of the factual dispute were not resolved in a state court hearing and that the material facts were not adequately developed there. Accordingly, the burden has shifted to Respondent. 28 U.S.C. §2254(d)(1) and (3).

II. IMPROPER JURY INSTRUCTIONS

Petitioner's second claim for habeas corpus relief relates to allegedly improper jury instructions given at Petitioner's trial in state court. Specifically, Petitioner attacks the instruction relating to justifiable homicide. The Court has reviewed the instructions given, Transcript at 121, and the applicable state law, § 782.02, Fla. Stat. The Court finds that the instructions given at trial were adequate, and, to the extent they differ in small part from the statute, that difference does not constitute a claim rising to constitutional proportions. Accordingly, Petitioner's request for relief with respect to this claim is hereby DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 22nd day of January, 1975.

/S/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, #003316,

Petitioner,

vs. No. 73-316Civ.T.H.

LOUIS L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondent.

WAIVER

The Petitioner, JOHN SYKES, hereby waives any contention or allegation as regards ineffective assistance of counsel at trial in the Twelfth Judicial Circuit of Florida or on appeal to the Second District Court of Appeals of Florida, pertaining to a Third Degree Murder Conviction for which he is presently confined in Union Correctional Institution at Raiford, Florida.

Dated this 20 day of November, 1973.

/S/ John Sykes

WITNESSES:

/S/ Calvin C. Campbell

/S/ John H. Henninger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Waiver was mailed to Charles Corces, Jr., Assistant Attorney General, 419 Stovall Professional Building, 305 Morgan Street, Tampa, Florida, 33602. 11/28/73

/S/ William F. Casler
WILLIAM F. CASLER
Counsel for Petitioner
502 Florida National Bank
St. Petersburg, Florida

(i) Motion to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

600 Camp Street
New Orleans, La. 70130
Telephone 504-489-5614

EDWARD W. WADSWORTH
Clerk

March 22, 1976

TO ALL COUNSEL OF RECORD

No. 75-1781 - Louie L. Wainwright, Director, Division of Corrections v. John Sykes

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by/S/ Susan M. Gravois
Deputy Clerk

/smg

CC: Mr. Charles Corces, Jr.
Mr. William F. Casler, Sr.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1781

D. C. Docket No. CA73-316-T-H

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,

Petitioner-Appellant,

versus

JOHN SYKES,

Respondent-Appellee.

Appeal from the United States District
for the Middle District of Florida

Before GEWIN, BELL* and SIMPSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle

District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 25, 1976

Issued as Mandate:

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER FILED PURSUANT TO SUPREME COURT RULE 24(5)

ROBERT L. SHEVIN
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
419 Stovall's Professional Building
305 North Morgan Street
Tampa, Florida 33602

Counsel for Petitioner

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #03316,

Respondent,

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

SUPPLEMENTAL BRIEF OF PETITIONER FILED PURSUANT TO SUPREME COURT RULE 24(5)

PRELIMINARY STATEMENT

Petitioner files this Supplemental Brief pursuant to Supreme Court Rule 24(5) for the purpose of calling attention to two new cases decided by this Honorable

Court on May 3, 1976: *Estelle v. Williams*, Case No. 74-676, as reported in 19 Cr.L 3061, and *Frances v. Henderson*, Case No. 74-5808, as reported in 19 Cr.L 3072.

ARGUMENT

The decision of the Court of Appeals, Fifth Circuit is in conflict with the above cited decisions of this Court in the following particulars; *inter alia*:

In *Frances v. Henderson* this Court clearly held that principles of comity require that the rule of *Davis v. United States*, 411 U.S. 233 (1973), applies with equal force when a federal court is asked in a habeas proceeding to overturn a state court conviction and that the habeas petition must show not only "cause" but prejudice in order to excuse the waiver. Quite to the contrary, the

Fifth Circuit held, in the instant case, that principles of comity did not refrain federal courts from determining the underlying constitutional claim even though the respondent never alleged or established "cause" because prejudice to the respondent was "inherent" (presumed).

The Fifth Circuit held, herein, that even where an accused has the assistance of counsel, there is a *sua sponte* obligation on the part of the trial court to determine the voluntariness of a confession even where it is not challenged by counsel. But in *Estelle v. Williams*, the Court said:

> "...Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and

during trial rests with the accused and his attorney. Any other approach would re-write the duties of trial judges and counsel in our legal system."

19 Cr.L at 3065

Respectfully submitted,

ROBERT L. SHEVIN
ATTORNEY GENERAL

CHARLES CORCES, JR.
Assistant Attorney General
419 Stovall's Professional Bldg.
305 North Morgan Street
Tampa, Florida 33602

Counsel for Petitioner

CERTIFICATE OF SERVICE

I, CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the _____ day of May, 1976, I served three copies of the Supplemental Brief of Petitioner Filed Pursuant to Supreme Court Rule 24(5) on William F. Casler, Esquire, Counsel for Respondent, 6795 Gulf Boulevard, St. Petersburg, Florida 33706, by a duly addressed envelope with postage prepaid.

CHARLES CORCES, JR.
Assistant Attorney General

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

ON WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CERTIORARI GRANTED
OCTOBER 12 1976

APPENDIX

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

PETITION FOR CERTIORARI FILED APRIL 28, 1976
CERTIORARI GRANTED OCTOBER 12, 1976

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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

June 26, 1973 — Respondent's original Petition for Writ of Habeas Corpus filed in U.S. District Court, Middle District, Tampa Division.

November 30, 1973 — Personal Waiver of John Sykes re ineffective assistance of counsel at trial or on appeal.

January 23, 1975 — Order of U.S. District Court, Middle District, Tampa Division.

January 30, 1975 — Supplementary Order of U.S. District Court, Middle District, Tampa Division.

February 25, 1976 — Opinion of the Court of Appeals, Fifth Circuit.

February 25, 1976 — Judgment of the Court of Appeals, Fifth Circuit.

March 22, 1976 — Denial of Petition for Rehearing *in banc* by the Court of Appeals, Fifth Circuit.

Louie L. WAINWRIGHT, Director,
Division of Corrections,
Petitioner-Appellant,

v.

John SYKES, Respondent-Appellee.

No. 75-1781.

United States Court of Appeals,
Fifth Circuit.

Feb. 25, 1976.

State appealed from an interlocutory order of the United States District Court for the Middle District of Florida, at Tampa, Wm. Terrell Hodges, J., in a habeas corpus case requiring it to conduct an evidentiary hearing to supplement the record and providing, in the alternative, that the Court would determine the issues on the state record as transmitted, if a supplemental evidentiary hearing were not held. The Court of Appeals, Simpson, Circuit Judge, held that if the trial judge had questioned the admissibility of statements made by defendant at the time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might now foreclose him, on petition for

federal habeas relief, from bringing additional or subsequent arguments regarding the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights.

Affirmed.

1. Criminal Law 412.2(5)

Any incriminating statement made by the defendant absent a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

2. Criminal Law 412.2(5)

A defendant might be too drunk to give a knowing and intelligent waiver of his right to counsel and his right not to incriminate himself and, in such a case, out-of-court statements made by him would be inadmissible at trial as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

3. Criminal Law 414

Before an admission or confession may be introduced in evidence against a defendant, it is incumbent on the trial judge to determine the voluntariness of the statements involved, and the defend-

ant's knowing and intelligent waiver of his constitutional rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

4. Constitutional Law 266.1(5)

As a matter of procedural due process, a defendant is entitled to a hearing on the issue of the voluntariness of an admission or confession made by him.

5. Criminal Law 1144.12

Waiver of Miranda rights will not be presumed from a silent record.

6. Criminal Law 671

Burden is on the state to secure a hearing outside the presence of the jury, not on the defendant to demand it, to determine the voluntariness of any statements made by the defendant and proposed to be used as evidence against him. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

7. Habeas Corpus 25.1(8)

If trial judge had questioned the admissibility of statements made by defendant at time of his arrest and had required the prosecution to show they were admissible, the defendant, who failed to object at or before trial to the introduction of the statements, would have been on notice as to the waiver of his rights, and pertinent Florida rule might foreclose him, on petition for federal habeas relief, from bringing additional or subsequent arguments regard-

ing the admissibility of the statements; but since the judge did not assure himself of the admissibility of the statements, the rule would not be construed as foreclosing defendant's opportunity to challenge their voluntariness and the concomitant waiver of his Miranda rights. 33 West's F.S.A. Rules of Criminal Procedure, rule 3.190(i).

Appeal from the United States District Court for the Middle District of Florida.

Before GEWIN, BELL* and SIMPSON, Circuit Judges.

SIMPSON, Circuit Judge:

The respondent below, Wainwright, (appellant, or occasionally, "the State"), appeals from an interlocutory order of the district court in a state habeas corpus case. That order required the state to conduct an evidentiary hearing to supplement the record before the district court, and provided that in the alternative, if such a hearing is not held, the district court will determine the issues on the state record as transmitted. The effect of the order was stayed for 90 days to permit this appeal. At issue is the petitioner-appellee's contention that statements made by him at the time of his state arrest were unconstitutionally

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.

used as evidence against him at trial, because, conceding that he received his *Miranda*[1] warnings as testified by sheriff's deputies, he was drunk at the time of his arrest and the making of the statements used, and thus incapable of a knowing waiver of the underlying constitutional rights involved. The respondent counters that appellee Sykes' failure to object to the introduction in evidence of the out of court statements at or before trial, required by Rule 3.190(i), Fla.R. Crim.Proc. 1972[2], waived his opportunity to challenge the voluntariness of the incriminating statements.

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1. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16 L.Ed.2d 694.

2. (i) *Motion to Suppress a Confession or Admissions Illegally Obtained.*

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Appellee was arrested and charged with second degree murder. On June 5, 1972, he was tried before a jury, and convicted of third degree murder, Fla. Stat. 782.04, in a Florida court. The conviction was affirmed on direct appeal. Subsequently, he unsuccessfully sought habeas corpus relief in the state courts. Thereafter he sought habeas corpus relief in the court below. In an unpublished order of January 23, 1975, the district court found that appellee's trial transcript and the state record was too meager a basis for findings as to the voluntariness of the waiver of the *Miranda* rights involved. Consequently, the court ordered that a *Jackson v. Denno* [3] type evidentiary hearing be held in the Florida court to determine the voluntariness of the out of court statements used as evidence against Sykes. The court later modified its order to permit an interlocutory appeal pursuant to Title 28, U.S.C. § 1292(b), and we accepted the appeal.

At issue then are two distinct waiver problems: (1) did Sykes knowingly and voluntarily waive his *Miranda* rights when he made inculpatory statements at the time of his arrest? (2) did appellee, by failing to object to the introduction of the statements into evidence, as provided by procedural State law, waive the right to bring this objection on appeal or in subsequent proceedings? The purpose of the evidentiary hearing the district court ordered is to determine the factual basis of the underlying waiver issue, or sub-

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3. 1964, 378 U.S. 368, 84 S.Ct. 1774, 12 L.Ed.2d 908.

stantive issue, to determine if Sykes was in fact so drunk he could not understand his *Miranda* rights, and thus could not knowingly waive them.[4] Our inquiry, in determining the propriety of the district court's order, must focus on the second, or procedural, waiver.

I. NATURE OF THE RIGHT

[1,2] Both appellee and the state recognize that any incriminating statement made by a defendant absent a knowing and intelligent waiver by him of his right to counsel and his right not to incriminate himself must be excluded from the evidence at trial. *Miranda v. Arizona*, 1966, 384 U.S. 436, 86 S.Ct. 1602, 16

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4. The trial transcript shows affirmatively that Sykes was advised of his rights at the jailhouse. The conversation in which Sykes made incriminating statements took place, however, at the scene of the shooting, shortly after the police had arrived. The record is not clear as to whether Sykes was informed of his *Miranda* rights before these initial statements were given. These initial inculpatory statements made by Sykes, while in the custody of the police, were inconsistent with Sykes' self defense theory at trial. The prosecution called sheriff's deputies who testified to Sykes' statements during the case in chief. The testimony of three separate witnesses indicates Sykes had been drinking at the time he made those statements, and raises the possibility that even if Sykes had been read his rights, he might not have been able to comprehend them, and might therefore have been unable to knowingly waive them.

L.Ed.2d 694. The state does not appear to object to the proposition, in the abstract, that a defendant might be too drunk to give such a knowing and intelligent waiver, and that, in such a case, out of court statements made by him would be inadmissible at trial as evidence against him.[5]

The Supreme Court in *Miranda*, in recognition of the importance of the defendant's Fifth and Sixth Amendment rights, stated that "[t]he warnings required and the waiver necessary in accordance with our opinion today are, in the absence of a fully effective equivalent, prerequisite to the admissibility of any statement made by a defendant". 384 U.S. at 476, 86 S.Ct. at 1629, 16 L.Ed.2d at 725. The state asserts that the protections and prerequisites *Miranda* set out as necessary to the introduction of a defendant's out of court statements might themselves be waived by the failure of the defendant to object to their introduction.

[3-6] Before an admission or confession may be introduced into evidence against a defendant, it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelli-

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5. Cf. *United States v. Taylor*, 5 Cir. 1975, 508 F.2d 761, 763: "The evidence must show the defendant was so affected as to make the statement, after appropriate warnings, unreliable or involuntary". [regarding the admissibility of statements made by a defendant while under the influence of drugs].

gent waiver of his constitutional rights. *Johnson v. Zerbst*, 1938, 304 U.S. 458, 88 S.Ct. 1019, 82 L.Ed. 1461. A defendant is entitled to a hearing on the issue of voluntariness as a matter of procedural due process. *Jackson v. Denno*, supra. The rule set out in *Jackson v. Denno* is that "a jury is not to hear a confession unless and until the trial judge has determined that it was freely and voluntarily given." *Sims v. Georgia*, 1967, 385 U.S. 538, 543-544, 87 S.Ct. 639, 643, 17 L.Ed.2d 593, 598, "Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary must appear from the record with unmistakable clarity". *Id.*, 385 U.S. at 544, 87 S.Ct. at 643, 17 L.Ed.2d at 598.[6] Long before *Jackson v. Denno* the Florida practice was to require the trial judge to hold a hearing outside the presence of the jury to determine the voluntariness of any statements by the defendant proposed to be used as evidence against him.[7] The bur-

6. The waiver of *Miranda* rights will not be presumed from a silent record. *Miranda v. Arizona*, 384 U.S. at 475, 86 S.Ct. at 1628, 16 L.Ed.2d at 724, citing *Carnley v. Cochran*, 1962, 369 U.S. 506, 82 S.Ct. 884, 8 L.Ed.2d 70.

7. "While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, that does not relieve the trial judge of the duty when evidence of this character is sought to be introduced to satisfy himself that the admissions were freely and voluntarily made before admitting

den is on the state to secure this prima facie determination of voluntariness, not upon the defendant to demand it. *McDole v. State*, Fla. 1973, 283 So.2d 553; *Reddish v. State*, Fla.1964, 167 So.2d 858; *Young v. State*, Fla.1962, 140 So.2d 97; *Smith v. State*, 3rd Fla.D.C.A.1974, 288 So.2d 522; *Dodd v. State*, 4th Fla.D.C.A. 1970, 232 So.2d 235.

II. WAIVER

Appellee argues that not only did the state fail to carry its burden in showing affirmatively, on the record, that the statements introduced were voluntarily made, but that the waiver principles enunciated in *Fay v. Noia*[8] make it plain that constitutional rights of such

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them. It is a duty which the law imposes upon the court in order that the prisoner's constitutional right to a fair and impartial trial may be protected and preserved, and this right should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by the respective counsel and won or lost according to their skill in playing the game according to the rules." *Stiner v. State*, 1919, 78 Fla. 647, 83 So. 565.

8. "We therefore hold that the federal habeas judge may in his discretion deny relief to an applicant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies.

fundamental importance as those considered here may only be waived by the defendant himself, deliberately, and not by his attorney without his personal knowledge, or through a procedural forfeit. The state, however, recites to us a

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"But we wish to make very clear that this grant of discretion is not to be interpreted as a permission to introduce legal fictions into federal habeas corpus. The classic definition of waiver enunciated in *Johnson v. Zerbst* — 'an intentional relinquishment or abandonment of a known right or privilege' — furnishes the controlling standard. If a habeas applicant, after consultation with competent counsel or otherwise, understandingly and knowingly forewent the privilege of seeking to vindicate his federal claims in the state courts, whether for strategic, tactical, or any other reasons that can fairly be described as the deliberate bypassing of state procedures, then it is open to the federal court on habeas to deny him all relief if the state courts refused to entertain his federal claims on the merits —though of course only after the federal court has satisfied itself, by holding a hearing or by some other means, of the facts bearing upon the applicant's default. At all events we wish it clearly understood that the standard here put forth depends on the considered choice of the petitioner. A choice made by counsel not participated in by the petitioner does not automatically bar relief. Nor does a state court's finding of waiver bar independent determination of the

litany of cases purporting to show that in instances such as this a purely procedural waiver would bind the defendant, notwithstanding the fact that he had no personal knowledge of the rights waived.

The state sees this as a case controlled by *Henry v. Mississippi*, 1965, 379 U.S. 443, 85 S.Ct. 564, 13 L.Ed.2d 408, which held that it is up to the federal courts to determine whether the enforcement of a state procedural rule serves a legitimate interest so as to preclude a state prisoner from raising questions of constitutional right by federal habeas corpus. Florida Rule of Criminal Procedure 3.190(i)[9] is a contemporaneous objection rule analogous to that considered in *Henry*. Their function is the same; "By immediately apprising the trial judge of the objection, counsel gives the court the opportunity to conduct the trial without using the tainted evidence." *Henry v. Mississippi*, supra, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. The facts of this case, however, are not such as to require that federal courts, from any principle of comity, refrain from determining the underlying constitutional claim of Sykes.

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question by federal courts on habeas, for waiver affecting federal rights is a federal question." (citations omitted throughout). *Fay v. Noia*, 1963, 372 U.S. 391, 438-439, 83 S.Ct. 822, 849, 9 L.Ed.2d 837, 869.

9. See Note 2, supra.

Henry dealt with the admissibility of a police officer's testimony as to evidence which had been illegally obtained. Counsel for the defendant in that case did not object at trial to the testimony, and therefore did not comply with the state's contemporaneous objection rule. The Court remanded the case to the state court to determine whether the defendant was "to be deemed to have knowingly waived decision of his federal claim when timely objection was not made to the admission of illegally seized evidence." *Id.*, 408 U.S. at 446, 85 S.Ct. at 566, 13 L.Ed.2d at 412. The Supreme Court stated that there was no question but "that a litigant's procedural defaults in state proceedings do not prevent vindication of his federal rights unless the State's insistence on compliance with its procedural rule serves a legitimate state interest." *Id.*, 408 U.S. at 448, 85 S.Ct. at 567, 13 L.Ed.2d at 413. As already noted, the contemporaneous objection rule considered in *Henry*, and presumably the one at bar, serve a legitimate state interest. The Supreme Court did not find a waiver in *Henry*, but remanded the case to the state courts, because the Court thought a motion for a directed verdict, made at the close of the State's evidence might have vindicated the state's interest in having the rule followed by alerting the trial judge to the objections of the defendant, and therefore the rule might have been reduced to mere form. The court felt this determination, and other evidentiary questions relating to whether or not error in admitting the evidence was subsequently cured, or whether the defense had engaged in a

deliberate by-pass of the Mississippi rule, would be more properly decided in the state courts. As to this later possibility, the Court opined that a deliberate by-pass of the Mississippi procedural rule would constitute a waiver binding on the defendant.

In *Davis v. United States*, 1973, 411 U.S. 233, 93 S.Ct. 1577, 36 L.Ed.2d 216, the Supreme Court held the failure of a federal defendant to assert, before trial, a claim of unconstitutional racial discrimination in the composition of the grand jury which had indicted him, as provided for by Rule 12(b)(2) of the Federal Rules of Criminal Procedure, constituted a waiver of his rights. The waiver foreclosed habeas corpus consideration of the issues raised. A major tenet of the *Davis* decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition.[10] In *Newman v. Henderson*, 5 Cir. 1974, 496 F.2d 896, we held, in a habeas corpus action brought by a state prisoner to challenge the racial composition of the grand jury which had indicted him, that absent a showing of actual prejudice, the principles of *Davis* would

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10. Rule 12(b)(2), F.R.Crim.P., provides for the waiver of claims to defects in the institution of criminal proceedings if not asserted before trial. The defendant may be relieved of this waiver "for cause shown". In *Shotwell Mfg. Co. v. United States*, 1963, 371 U.S. 341, 83 S.Ct. 448, 9 L.Ed.2d 357, and in *Davis*, supra, the Court indicated actual prejudice would be a factor in "cause shown".

bind the petitioner to a waiver predicated upon state procedural requirements. However in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent.

The state pursues its claim of waiver by citing *Winters v. Cook*, 5 Cir. 1973, 489 F.2d 174 (En Banc). In that case we held that the defendant had waived his right, by his guilty plea to a murder charge, to subsequently challenge by writ of habeas corpus the racial composition of the grand jury that had indicted him. The record of that case indicated Winter's attorney fully considered the possibility of raising constitutional objections on behalf of his client, but rejected this option for tactical reasons in favor of a plea of guilty (which the state was induced to accept by the "pry-bar" effect of the threat of the possible constitutional objection) which avoided the possibility of a death sentence. The court held that despite the fact the defendant had not been consulted with on the waiver of the grand jury issue, he was bound by that waiver. The court held however, as had the Supreme Court in *Henry v. Mississippi*, that some "exceptional" circumstances would preclude the waiver by counsel of certain rights without the defendant's knowledge. We are confident that *Miranda* rights, in a situation such as this, might constitute such "exceptional" circumstances, see Developments in the Law—Federal Habeas Corpus, 83 Harv.L.Rev. 1038, 1111 n. 102 (1970), but refrain from basing our holding on this rationale alone.

In a case somewhat similar, factually, to this one, the Seventh Circuit in *United States ex rel. Allum v. Twomey*, 7 Cir. 1970, 484 F.2d 740, considered the juxtaposition of *Fay v. Noia* and *Davis v. United States* in relation to a state prisoner's assertion that he did not "knowingly and deliberately" waive his rights to object to the admissibility of an in custody statement made by him. The court found that the state defendant should be held to a waiver by his failure to object even though it was not a personal waiver, but one attributable to his attorney. In evaluating the facts it found persuasive in reaching this conclusion, the court found "there was a reasonable tactical basis for counsel's failure to object to the statement." *Id.*, at 745.

The failure to object in this case cannot be dismissed as a trial tactic, and thus a deliberate by-pass. Aside from the state's bare allegation that such was the case, without the suggestion of the slighted tactical benefit, there is nothing here present upon which to speculate that the defense's failure to object to the introduction of Sykes' statement was a strategic decision. We can find no possible advantage which the defense might have gained, or thought they might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190(i).

III. CONCLUSION

The burden is on the state to introduce a proper predicate for the admission of a confession or statement against interest

into evidence. The trial judge, before receiving the admissions or confessions of a defendant must hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made. *Jackson v. Denno*, supra. This is a pre-requisite to the introduction of the evidence; and the opportunity to have such a hearing is a pre-requisite to any assertion of waiver because of the defendant's failure to object.

[7] The state's interest then, if not to be reduced to mere form, in having Florida Criminal Procedure Rule 3.190(i) followed, must be co-extensive with the established burden on the state. If the trial judge had questioned the admissibility of the statements, required the prosecution to show they were admissible, appellee would have been on notice as to the waiver of his rights, and Rule 3.190(i) might now foreclose him from bringing additional or subsequent arguments regarding the admissibility of the statement in question. Because the trial afforded appellee in this case did not conform to procedural requirements, long established, that the trial judge must assure himself of the admissibility of the criminal defendant's statements, we refuse to construe Rule 3.190(i) as foreclosing Sykes' opportunity to challenge the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights.

The actual prejudice to appellee stemming from enforcing a waiver of *Miranda* rights, as well as the total absence of any indication that his failure to object

is attributable to trial tactics, persuade us that the district court should be affirmed. Justice requires it.

The state will have ninety days from the time our mandate issues to conduct an evidentiary hearing to determine whether Sykes was properly apprised of his *Miranda* rights, and understood and knowingly waived those rights at the time he made the incriminating statements used against him. If the state does not initiate a hearing before the expiration of that time, the district court may determine the issues on the record as transmitted.

The order appealed from is in all respects

Affirmed.

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

October Term, 1975

No. 75-1781

D. C. Docket No. CA73-316-T-H

LOUIE L. WAINWRIGHT, Director,
Division of Corrections,

Petitioner-Appellant,

versus

JOHN SYKES,

Respondent-Appellee.

Appeal from the United States District
for the Middle District of Florida

Before GEWIN, BELL* and SIMPSON, Circuit
Judges.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Middle

District of Florida, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed.

February 25, 1976

Issued as Mandate:

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* Judge Bell participated fully in the decision of this case and concurred in this opinion prior to the effective date of his resignation, March 1, 1976.

UNITED STATES COURT OF APPEALS
FIFTH CIRCUIT
OFFICE OF THE CLERK

600 Camp Street
New Orleans, La. 70130
Telephone 504-489-5614

EDWARD W. WADSWORTH
Clerk

March 22, 1976

TO ALL COUNSEL OF RECORD

No. 75-1781 - Louie L. Wainwright, Director, Division of Corrections v. John Sykes

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Dear Counsel:

This is to advise that an order has this day been entered denying the petition( ) for rehearing, and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it, (Rule 35, Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the petition( ) for rehearing en banc has also been denied.

See Rule 41, Federal Rules of Appellate Procedure for issuance and stay of the mandate.

Very truly yours,

EDWARD W. WADSWORTH, Clerk

by/S/ Susan M. Gravois
Deputy Clerk

/smg

CC: Mr. Charles Corces, Jr.
Mr. William F. Casler, Sr.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, Petitioner, vs. LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida, Respondent.	No. 73-316-Civ.T.H.

ORDER

On April 25, 1973, Petitioner, a state prisoner, filed with the Clerk his pro se petition for habeas corpus relief pursuant to 28 U.S.C. §2254. In accordance with a General Order of Assignment, the petition was referred to the United States Magistrate for his Report and Recommendation. The Magistrate, on June 26, 1973, authorized the commencement of the action without prepayment of costs or fees; and, on August 14, 1973, he appointed counsel for Petitioner pursuant to the Criminal Justice Act of 1964, 18 U.S.C. § 3006A. Issue was then joined, and counsel presented briefs concerning the legal and factual issues involved. Thereafter, on August 23, 1974, the

Magistrate entered his Report and Recommendation, recommending that an evidentiary hearing be conducted. See, Wingo v. Wedding, ___ U.S. ___, 94 S.Ct. 2842 (1974).

Accordingly, the Court ordered the filing of a pre-evidentiary hearing stipulation, ordered the production of Petitioner in Tampa, and scheduled a pre-evidentiary hearing and evidentiary hearing. Pursuant to stipulation of counsel, the pre-evidentiary hearing was cancelled and the cause came on for evidentiary hearing on January 9, 1975.

While the file in this cause is sketchy at best, counsel for Petitioner summarized the undisputed facts of the case at the January 9 hearing:

In 1972, Petitioner was charged with second degree murder in the Twelfth Judicial Circuit Court, DeSoto County, Florida. Following a jury trial, Petitioner was convicted of third degree murder and was sentenced to a term of ten years incarceration. An appeal ensued, and his conviction was affirmed by the Second District Court of Appeal. Certiorari was denied by the Florida Supreme Court. In addition, a motion to vacate, set aside or correct sentence addressed to the trial court pursuant to Rule 3.850, Fla. R.Crim.P., was denied, as were petitions for writ of habeas corpus filed in the Second District Court of Appeal and the Florida Supreme Court.

Petitioner now presents two claims to this Court. First, Petitioner asserts

that certain statements made by him to sheriff's deputies were improperly admitted at trial since Petitioner was intoxicated at the time he made them and, therefore, was incapable of understanding the Miranda warnings which were supposedly given. Second, Petitioner asserts that improper instructions were given to the trial jury. With respect to these claims, counsel for Petitioner stated at the January 9 hearing that Petitioner would stand on the trial transcript made in state court and the official documents and papers in the court file. He called no witnesses. Likewise, Respondent presented no additional testimony or evidence.

I. MIRANDA CLAIM

Dealing first with the Miranda claim, it is undisputed that counsel for Petitioner made no motion to suppress the statements prior to the trial in state court, made no objection to the introduction of them at trial, and did not assign as error on appeal the fact that the statements had been received in evidence. However, Petitioner did present his argument to the state courts in his post-conviction motions and petitions, and the Court finds that Petitioner has exhausted his state remedies as to this claim as required by 28 U.S.C. § 2254(b).

Respondent argues that Petitioner's failure to raise this issue in the state courts by motion to suppress, objection, or appeal constitutes waiver of his claim,

and he should not be heard to raise it in this Court. The waiver issue has been the subject of much discussion in the authorities, and the law is now fairly settled. In exceptional circumstances, some strategic decisions at trial can preclude an accused from later asserting a constitutional claim on federal habeas corpus. Henry v. Mississippi, 379 U.S. 443, 451-452, 85 S.Ct. 564, 569 (1965); Fay v. Noia, 372 U.S. 391, 439, 83 S.Ct. 822, 849 (1963); Winters v. Cook, 489 F.2d 174, 176-180 (5th Cir. 1973). Other than the bald assertion, however, Respondent has pointed to nothing in the record and has adduced no evidence here that would demonstrate the kind of exceptional circumstance recognized in the authorities as constituting a waiver. Clearly, therefore, it would be error for the Court to give effect to Respondent's contention on this record. See, e.g., Collier v. Estelle, ___ F.2d ___ (5th Cir. 1975) [slip op. P. 2312, No. 74-2474, Jan. 9, 1975]; Bailey v. Alabama, ___ F.2d ___ (5th Cir. 1975) [slip op. p. 2159, No. 74-2104, Jan 6, 1975].

Turning to the merits of Petitioner's claim that he was intoxicated and incapable of understanding the Miranda warnings given him, the authorities are clear that Miranda v. Arizona, 384 U.S. 436, 86 S.Ct. 1602 (1966), requires that certain warnings or cautions be given to a suspect in a custodial situation and that the suspect fully understand the substance of his constitutional rights as explained in those warnings.

Thus, it is said in the fountainhead case itself:

> "If the interrogation continues without the presence of an attorney and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel . . . . This Court has always set high standards of proof for the waiver of constitutional rights,. . ., and we reassert these standards as applied to in-custody interrogation. Since the State is responsible for establishing the isolated circumstances under which the interrogation takes place and has the only means of making available corroborated evidence of warnings given during incommunicado interrogation, the burden is rightly on its shoulders."

Miranda v. Arizona, supra, at 475, 86 S.Ct. at 1628 [citations omitted].

Consequently, the issue presently before the Court, as it is in all habeas cases presenting the Miranda issue, is: has the prosecution sustained its "heavy burden" of demonstrating that the defendant was effectively advised of his rights, and did he knowingly and under-

standingly decline to exercise them? Hill v. Whealon, 490 F.2d 629, 630 (6th Cir. 1974); Hughes v. Swenson, 452 F.2d 866, 868 (8th Cir. 1971). Cf. Hamilton v. Smith, 450 F.2d 922, 923 (5th Cir. 1971); Goodwin v. Smith, 439 F.2d 1180, 1182 (5th Cir. 1971). As to that issue, the only evidence before the Court is that developed in the state trial itself, neither party having presented any testimony or evidence at the January 9 hearing.

The transcript of the proceedings and testimony taken before the Hon. John D. Justice, Circuit Judge, at Petitioner's June 5, 1972 trial is markedly void of the facts and information required by this Court to make a determination of the issue now before it.* The witness, Neil Tyree, testified that he remembered hearing someone advise Petitioner of his "constitutional rights" at the scene of the homicide, Transcript at 16 and 23, but he further testified that he did not remember who it was who gave Petitioner his "rights," Transcript at 23. No testimony at all was given by this witness concerning the substance of any warnings given Petitioner or Petitioner's

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* Under no circumstances should this observation be taken as a criticism of the trial judge. He was given no opportunity to pass on the matter. It should also be observed that Petitioner has withdrawn his claim of ineffective assistance of counsel.

ability to understand any such warnings. The witness did testify, however, that Petitioner smelled of alcohol, Transcript at 19 and 24. Another witness, Gus Grethan, a DeSoto County Deputy Sheriff, testified that he and G. H. Skinner, also a Deputy Sheriff, read Petitioner's rights to him from a card later at the jail, Transcript at 35, and that, at the time the officers arrived at the scene of the homicide, Petitioner was sufficiently intoxicated to be arrested for being drunk, Transcript at 39. Again, no testimony at all was given by this witness, or by any other, concerning the substance of any warnings given Petitioner or Petitioner's ability to understand any such warnings. Thus, were it proper for this Court to directly pass upon the sufficiency of the evidence adduced at trial to sustain the prosecution's "heavy burden," the Court would be constrained to hold that the evidence was not sufficient. However, such a determination at this point would be improper.

A review of the state court proceedings at trial, on appeal, and on post-trial collateral attack reveals that at no time has Petitioner received a hearing on the issue of the voluntariness of his statements pursuant to Jackson v. Denno, 378 U.S. 368, 391, 84 S.Ct. 1774, 1778 (1964). Jackson requires such a hearing; and, further, it requires that the hearing be held in the state courts, rather than in federal court on habeas corpus. Jackson v. Denno, supra, at 393, 84 S.Ct. at 1789-1790; Sigler v. Parker, 396 U.S. 482, 484, 90 S.Ct. 667, 669 (1970). Accordingly, this

Court will stay proceedings in this cause for a period of 90 days from the date hereof to allow the state courts a reasonable opportunity to afford Petitioner a hearing on the voluntariness issue. At the expiration of that period of time, the Court will continue to stay this proceeding if a hearing is then pending in state court. If one is not, the Court will then be required to determine whether or not the state carried its burden on the basis of the record as it presently exists.

Before leaving Petitioner's Miranda claim, two additional comments need to be made. First, no distinction can be drawn between the Jackson case, which deals with confessions, and the subsequent Miranda case, which deals with mere statements. For Miranda makes it clear that "the privilege against self-incrimination protects the individual from being compelled to incriminate himself in any manner; it does not distinguish degrees of incrimination." 384 U.S. at 476, 86 S.Ct. at 1629.

Second, the fact that 28 U.S.C. § 2254(d) places the burden upon Petitioner in this proceeding to show by clear and convincing evidence that the state court's determination was erroneous, does not assist Respondent in these circumstances. By pointing to the transcript of the state trial, Petitioner has succeeded in demonstrating that the merits of the factual dispute were not resolved in a state court hearing and that the material facts were not adequately developed there. Accordingly, the burden has shifted to Respondent. 28 U.S.C. §2254(d)(1) and (3).

II. IMPROPER JURY INSTRUCTIONS

Petitioner's second claim for habeas corpus relief relates to allegedly improper jury instructions given at Petitioner's trial in state court. Specifically, Petitioner attacks the instruction relating to justifiable homicide. The Court has reviewed the instructions given, Transcript at 121, and the applicable state law, § 782.02, Fla. Stat. The Court finds that the instructions given at trial were adequate, and, to the extent they differ in small part from the statute, that difference does not constitute a claim rising to constitutional proportions. Accordingly, Petitioner's request for relief with respect to this claim is hereby DENIED.

IT IS SO ORDERED.

DONE and ORDERED at Tampa, Florida, this 22nd day of January, 1975.

/S/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES,	)	
	)	
Petitioner,	)	
	)	
vs.	)	No. 73-316-Civ-T-H
	)	
LOUIE L. WAINWRIGHT, Director, Division of Corrections, State of Florida,	)	
	)	
Respondent.	)	
	)	

SUPPLEMENTARY ORDER PURSUANT TO 28 U.S.C. § 1292(b)

THIS CAUSE came on before the Court upon Respondent's Petition for Order Amending the Court's Order of January 23, 1975.

The January 23 Order stayed proceedings in this cause for a period of 90 days to allow the state courts

a reasonable opportunity to afford Petitioner a hearing on the issue of the voluntariness of certain statements made by him and introduced into evidence against him at his 1972 state criminal trial. Respondent argues, however, that the record, as it presently exists, requires that the Court conclude, as a matter of law, that Petitioner waived his right to raise this issue on federal habeas corpus. Therefore, Respondent seeks to take an interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

So that Respondent can promptly and expeditiously petition the Court of Appeals to permit an appeal from the order of January 23, the Court will grant Respondent's instant petition. Accordingly, the Court hereby makes the

required findings and certifications in accordance with the statute. The Court will not, however, stay proceedings in this cause beyond the 90 days announced in the prior order. Pursuant to the statute, of course, Respondent may direct a request for stay to the Court of Appeals.

IT IS SO ORDERED.

DONE AND ORDERED at Tampa, Florida, this 30th day of January, 1975.

/S/ Wm. Terrell Hodges
UNITED STATES DISTRICT JUDGE

PETITION FOR WRIT OF HABEAS CORPUS
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

PERSONS IN STATE CUSTODY

John Sykes #003316
Full name and prison number
(if any) of petitioner

~~73-83-Misc-T~~
73-316-Civ.T.H.

The State of Florida
Name of Respondent

INSTRUCTIONS - READ CAREFULLY

In order for this petition to receive consideration by the District Court it shall be in writing (legibly)(handwritten or typewritten), signed by the petitioner and verified (notarized), and it shall set forth in concise form the answers to a particular question on the reverse side of the page or an additional blank page. Petitioner shall make it clear to which question any such continued answer refers.

Since every such petition for habeas corpus must be sworn to under oath, any false statement of a material fact therein may serve as the basis of prosecution and conviction for perjury. Petitioners should therefore exercise care to assure that all answers are true and correct.

If the petition is taken in forma pauperis it shall include an affidavit (attached at the back of the form) setting forth information which establishes that petitioner will be unable to pay the fees and cost of the habeas corpus proceeding. When the petition is completed, the original and one copy shall be mailed to: CLERK, UNITED STATES DISTRICT COURT, MIDDLE DISTRICT OF FLORIDA, P. O. Box 3270, Tampa, Florida 33601.

1. Place of detention Union County Correctional Institution at Raiford, Florida

2. Name and location of Court which imposed sentence Twelfth Judicial Circuit Court, County of DeSoto, Arcadia, Florida

3. The indictment number or numbers (if known) upon which and the offense or offenses for which sentence was imposed:

   (a) Case No. 2683

   (b)

   (c)

4. The date upon which sentence was imposed and the terms of the sentence:

   (a) June 5th, 1972, (Ten Years)

(b) _____

(c) _____

5. Check whether a finding of guilty was made:

(a) After a plea of guilty _____

(b) After a plea of not guilty X

(c) After a plea of nolo contendere

_____

6. If you were found guilty after a plea of not guilty, check whether that finding was made by:

(a) A jury X

(b) A Judge without a jury _____

7. Did you appeal from the judgement of conviction or the imposition of sentence: yes.

8. If you answered "yes" to (7), list

(a) The name of each court to which you appealed:

i Second District Court of Appeal, Lakeland, Florida.

ii State Supreme Court of Florida

iii _____

(b) The result in each such court to which you appealed.

i Judgment Affirmed.

ii denied due to lack of jurisdiction.

iii

(c) The date of each such result:

i Case No. 72-592, opinion filed, 12-20-72.

ii

iii

(d) if known, citations of any written opinion or orders entered pursuant to such results:

i not known

ii not known

iii

9. If you answered "no" to (7), state your reasons for not so appealing:

(a)

(b)

(c)

10. State concisely the grounds on which you base your allegation that you are being held in custody unlawfully.

(a) Denial of procedural Due Process of Law.

(b) Denial of equal Protection of the Law.

(c) Violation of Constitutional Rights.

11. State concisely and the same order the facts which support each of the grounds set out in (10):

(a) _____

(b) _____

(c) _____

12. Prior to this petition have you filed with respect to this conviction

(a) Any petition in a state of Florida Court under the provisions of Florida Rules of Criminal Procedure 1.850(1968)(previously Criminal Procedure Rule 1) of the Florida supreme Court yes

(b) Any petitions in State or Federal Courts for habeas corpus? yes

(c) Any petitions in the United States Supreme Court for certiorari other than petitions, if any, already specified in (8) No.

(d) Any other petitions, motions or applications in this or any other Court? Yes

13. If you answered "yes" to any part of 912, list with respect to each petition, motion or application.

(a) The specific nature thereof:

i Motion to Vacate (1.850)(3.850)

ii Petition for a Writ of Habeas Corpus.

iii Petition for a Writ of Habeas Corpus.

(b) The name and location of the Court in which each was filed.

i. Circuit Court DeSoto County, Arcadia, Fla.

ii. 2nd District Court of Appeal, Lakeland, Florida.

iii. Supreme Court of Florida, Tallahassee, Fla.

(c) The disposition thereof:

i. denied

ii. Affirmed

iii. denied

(d) The date of each such disposition:

i. (Appeal)

ii. (20th day of February, 1973.) (First Cert.)

iii (January 19, 1973)

(e) if known citations of any written opinions or orders entered pursuant to each such disposition

i. UNKNOWN

ii.

iii.

14. Has any ground set forth in (10) been previously presented to this or any other Court, State or Federal, in any petition, motion or application which you have filed? yes

15. If you answered "yes" to (14), identify

(a) Which grounds have been previously presented:

i. The Same Grounds presented herein

ii.

iii.

(b) The proceedings in which each ground was raised:

i. _____

ii. _____

iii. _____

16. If any ground set forth in (10) has not previously been presented to any Court, state or federal, set forth the ground, state concisely the reasons why such ground has not previously been presented:

(a) _____

(b) _____

(c) _____

17 Were you represented by an attorney at any time during the course of:

(a) Your arraignment and plea? yes

(b) Your trial, if any? yes

(c) Your sentencing? yes

(d) Your appeal, if any, from the judgement of conviction or the imposition of sentencing? yes

(e) Preparation, presentation or consideration of any petitions, motions, or application with respect to this conviction,

which you filed?_____

_____

(f) did you waive your right of representation by an attorney for any of the above proceedings?_____

NO.

18. If you answered "yes" to one or more parts of (17), list:

(a) the name and address of each attorney who represented you:

i. _____

ii. _____

(b) The proceedings at which each such attorney represented you:

i. _____

ii. _____

19. If you are seeking leave to proceed in forma pauperis, have you completed the sworn affidavit setting forth the required information (see instructions, Page I of this form?____

_____

X John Sykes
Signature of petitioner

(
(SS
(

John Sykes, being first sworn under oath, presents that he has subscribed to the foregoing petition and does state that the information therein is true and correct to the best of his knowledge and belief.

X John Sykes
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 23 day of April 19 73 .

(undecipherable)
Notary Public

My Commission expires

Notary Public State of Florida at Large
My Commission expires Feb. 26, 1975
General Insurance Underwriters, Inc.

(Date)

FORMA PAUPERIS AFFIDAVIT

(SEE INSTRUCTIONS, PAGE I OF THIS FORM)

x John Sykes
Signature of Petitioner

(Thumb Print)

)
) SS
)

John Sykes Being first sworn under oath, presents that he has subscribed to the above and does state that the information therein is true and correct to the best of his knowledge and belief.

x John Sykes
Signature of Affiant

SUBSCRIBED AND SWORN to before me this 23 day of April, 19 73.

(undecipherable)
Notary Public

My Commission expires
NOTARY PUBLIC STATE OF FLORIDA AT LARGE
MY COMMISSION EXPIRES FEB. 26, 1975
GENERAL INSURANCE UNDERWRITERS, INC.

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

JOHN SYKES, #003316,

Petitioner,

vs. No. 73-316Civ.T.H.

LOUIS L. WAINWRIGHT, Director, Division of Corrections, State of Florida,

Respondent.

WAIVER

The Petitioner, JOHN SYKES, hereby waives any contention or allegation as regards ineffective assistance of counsel at trial in the Twelfth Judicial Circuit of Florida or on appeal to the Second District Court of Appeals of Florida, pertaining to a Third Degree Murder Conviction for which he is presently confined in Union Correctional Institution at Raiford, Florida.

Dated this 20 day of November, 1973.

/S/ John Sykes

WITNESSES:

/S/ Calvin C. Campbell

/S/ John H. Henninger

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Waiver was mailed to Charles Corces, Jr., Assistant Attorney General, 419 Stovall Professional Building, 305 Morgan Street, Tampa, Florida, 33602. 11/28/73

/S/ William F. Casler
WILLIAM F. CASLER
Counsel for Petitioner
502 Florida National Bank
St. Petersburg, Florida

§ 2254. State custody; remedies in Federal courts

(a) The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

(b) An application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court shall not be granted unless it appears that the applicant has exhausted the remedies available in the courts of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner.

(c) An applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented.

AMENDMENT V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself; nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

(i) Motion to Suppress a Confession or Admissions Illegally Obtained.

(1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

WILLIAM F. CASLER
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6795 Gulf Boulevard
St. Petersburg Beach, Florida 33706

Counsel for Respondent

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In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No._____

LOUIE L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR RESPONDENT IN OPPOSITION

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

1. Whether, as a prerequisite to the admissability of any admission or confession of a Defendant in a criminal prosecution, the State is required to hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made.

2. Whether Jackson v. Denno, 378 U.S. 368 (1964), mandates a voluntariness hearing where the admissability of the

confession or admission is not challenged and where such denial would deprive a person of a fundamental right and would be inherently prejudicial to the Defendant.

STATEMENT OF THE CASE

The Respondent accepts and adopts the Statement of the Facts as referred to in the Brief of the Petitioner except the contention by Petitioner that the failure to object to the admissability of confession constituted a waiver of his right to a hearing on the voluntariness of the confession. In addition, Respondent applied to the trial Court, the Second District Court of Appeal of Florida, and to the Supreme Court of Florida for a hearing by way of Petitions for Writ of Habeas Corpus - all of which were denied. Failing in all State Courts, Respondent sought relief in Federal District Court.

REASONS FOR DENIAL OF CERTIORARI

1. THERE IS NO IMPORTANT QUESTION OF FEDERAL LAW.

The decision of the lower Court did not deny the State the right to insist on enforcement of its procedural rule, nor did it destroy the rule. Rather as the lower Court correctly stated:

> "The state's interest the, if not to be reduced to mere form in having Florida Criminal Procedure Rule 3.190(i) followed, must be co-extensive with the established burden on the state." (Text from lower Court's opinion in Petitioner's Appendix at Page A-17).

The burden upon the State is to make a prima facie determination of voluntariness, not upon the Defendant to demand it. McDole v. State, 283 So.2d 553 (Fla. 1973); Reddish v. State, 167 So.2d 858 (Fla 1964); Young v. State, 140 So.2d 97 (Fla. 1962); Smith v. State, 288 So.2d 522 (Fla. App. 1974). Therefore, a hearing on voluntariness is a prerequisite to any assertion of waiver because of the Defendant's failure to object.

The lower Court specifically gave effect to the rule by stating that the rule may foreclose a Defendant from any subsequent arguments or attach once a determination has been made regarding the voluntariness and admissability of the statement in question.

The decision of the lower Court in the instant case does not raise the issue of whether State procedural rules should be followed or not but rather that the rule involved is not as narrow as the Petitioner demands.

2. THERE IS NO CONFLICT OF DECISION.

The Petitioner relied on Henry v. Mississippi, 379 U.S. 443 (1965) and Davis v. United States, 411 U.S. 233 (1973) for its contention that the failure to raise a constitutional issue, as required by the rule, constitutes a waiver and precludes consideration of the issue in collateral proceedings. However, these cases do not rely solely on whether a timely objection was made, but rather whether

the defense deliberately bypassed the State procedural rule or whether there was prejudice to the Defendant by such a waiver.

Similarly, the Petitioner claims that the holding of the lower Court is in direct conflict with that of the Seventh Circuit in United States ex rel Allum v. Twomey, 484 F.2d 740 (7th Cir. 1973). However, the Court in Twomey said there was a reasonable tactical basis for the failure to object; and also, there was no prejudice shown. Therefore, the present case is not in conflict.

Furthermore, there is no conflict with Curry v. Wilson, 405 F.2d 110 (9th Cir. 1969). The Court determined there, as in the above cases, that the record conclusively demonstrated that the defense deliberately, as a matter of trial strategy, waived the grounds.

In the present case, there was no affirmative decision to waive the voluntariness hearing. The lower Court was absolutely correct in stating that the admissability of a confession or incriminating statement is inherently prejudicial. In addition, there was no possible advantage for the defense's failure to object. Therefore, no direct conflict with the cases relied upon by the Petitioner exists with the lower Court's decision that the lower Court found that there was no evidence of a waiver for trial tactics.

3. THERE IS NO CONFLICT IN THE DECISION OF THIS COURT AS REGARDS Jackson v. Denno, 378 U.S. 368 (1964), REQUIRING A VOLUNTARINESS HEARING WHEN A CONVICTION IS FOUNDED ON AN INVOLUNTARY CONFESSION.

The Petitioner places its emphasis on the word "challenge" in the claim that a voluntariness hearing was not required in the present case. The Petitioner adds further that Jackson v. Denno, 378 U.S. 368 (1964) only requires a proper forum to be provided whereby a challenge to the voluntariness of a confession will be determined by the Court as a matter of law. However, these claims seem to ignore the basis of a voluntariness hearing. This Court cited Rogers v. Richmond, 365 U.S. 534, in the decision in Jackson by stating that:

> "It is now axiomatic that a Defendant in a criminal case is deprived of due process of law if his conviction if founded in whole or part upon an involuntary confession, without regard for the truth or falsity of the confession."
> (Text at 376, emphasis supplied).

This Court stated in Sims v. Georgia, 385 U.S. 538 (1967) that the Jackson decision is a constitutional rule and the rule states that a jury must not hear a confession unless and until it has been determined by the trial judge to have been willingly and voluntarily made.

In addition, the decision in Sims required that the record must show with unmistakable clarity that the confession was voluntary.

The Petitioner cites Lego v. Twomey, 404 U.S. 477 (1972) to further emphasize the need for a "challenge" prior to requirement of a voluntariness hearing. However, the opinion also states that only voluntary confessions may be admitted at the trial.

In its Supplemental Brief, the Petitioner relies on the two additional cases of Estelle v. Williams, Case No. 74-676, as reported in 19 Cr.L 3061, and Frances v. Henderson, Case No. 74-5808, as reported in 19 Cr.L 3072, both of which can be distinguished from the present case. In Estelle v. Williams, this Court stated that the failure to object to the accused wearing prison garb could well be viewed as part of trial strategy. This Court added further that the burden of a trial judge is less than that which is required in a situation similar to Johnson v. Zerbst, 304 U.S. 458 (1938). In Zerbst, there was a relinquishment of a fundamental right and thus due process would require a willing waiver of counsel. Similarly, due process would require that a confession go to a jury only upon a determination that it is voluntary.

This Court in Frances v. Henderson, does not say, as Petitioner claims, that the principles of comity require that the rule of Davis v. United States, 411 U.S. 233 (1973), applies with equal force whenever a Federal Court is asked in a habeas corpus proceeding to overturn a State Court conviction. But rather, it was limited to the situation involving an allegedly unconstitutional Grand Jury indictment. Furthermore, the above rule concerning grand juries may indeed require "cause" to be shown and actual prejudice also. Whereas, in the present case the lower Court was absolutely correct in stating that prejudice is inherent when the case involves the admissability of a confession or incriminating statement.

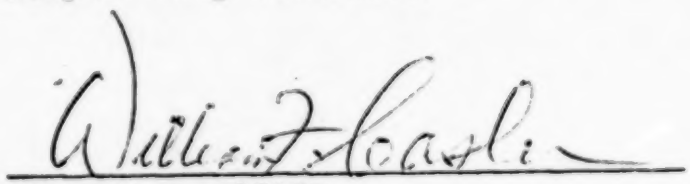
Finally, the issue of whether Jackson v. Denno, 378 U.S. 368 (1964), mandates a voluntariness hearing does not even

have to be decided. As indicated earlier and as the lower Court properly stated, Florida practice has required the trial judge to hold a hearing outside the presence of the jury to determine the voluntariness of any statements made by the Defendant proposed to be used against him. The burden is on the State to secure a prima facie determination of the voluntariness of the confession, not upon the Defendant to demand it. The lower Court properly stated in its decision that should the Prosecutor fail to lay the proper predicate for the introduction of a confession or admission that the Court has a responsibility to inquire as to the voluntariness of the matter.

CONCLUSION

For these reasons, the Writ of Certiorari should properly be denied and affirm the obvious holding of the Court of Appeals in and for the Fifth Circuit which affirmed the studious and knowledgable opinion of the Federal District Court.

Respectfully submitted,



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Counsel for Respondent

CERTIFICATE OF SERVICE

I, WILLIAM F. CASLER, Counsel for Respondent, and a member

of the Bar of the United States, hereby certify that on the 21st day of May, 1976, I served two copies of the Brief for Respondent in Opposition on Charles Corces, Jr., Assistant Attorney General, 419 Stovall's Professional Building, 305 North Morgan Street, Tampa, Florida 33602, Counsel for Petitioner, by a duly addressed envelope with postage prepaid.

William F. Casler

WILLIAM F. CASLER

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1975

No. 75-1578

LOUIE L. WAINWRIGHT, Secretary
Department of Offender Rehabilitation, State of Florida,

Petitioner,

vs.

JOHN SYKES, #003316,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

BRIEF FOR THE PETITIONER

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OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 528 F.2d 522.

JURISDICTION

The judgment of the court of appeals was entered February 25, 1976 (A. 19-20). The Fifth Circuit denied a timely petition for rehearing en banc on March 22, 1976 (A. 21-22). The petition for writ of certiorari was filed on April 28, 1976, and was granted on October 12, 1976. The jurisdiction of this Court rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States (A. 50).

Amendment XIV, Constitution of the United States (A. 50).

STATUTE INVOLVED

Title 28 U.S.C. § 2254(a)(b) (A. 49).

COURT RULE INVOLVED

Florida Rule of Criminal Procedure 3.190 (1972) (A. 51).

QUESTIONS PRESENTED

1. WHETHER THE FAILURE TO QUESTION THE ADMISSIBILITY OF AN OUT-OF-COURT STATEMENT, AT OR BEFORE TRIAL, BARS A STATE PRISONER FROM PRESENTING HIS VOLUNTARINESS CLAIM IN A FEDERAL HABEAS PROCEEDING WHERE SUCH FAILURE CONSTITUTES A WAIVER UNDER STATE PRACTICE.

2. WHETHER JACKSON V. DENNO, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE

THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED.

STATEMENT OF THE CASE

In 1972, John Sykes was charged with second degree murder in DeSoto County, Florida. A jury trial was held and Sykes was found guilty of third degree murder. Sykes was sentenced to a term of ten years imprisonment in the state prison (A. 24).

During his trial, certain inculpatory statements made by him were introduced in evidence. Sykes never challenged the admissibility of the statements either at or before trial (A. 25). This constitutes a waiver of the issue under Florida practice. Sykes appealed his conviction but he did not raise the issue of the admissibility of his statements on appeal (A. 25). The judgment and sentence were affirmed.

Subsequently, Sykes filed a petition for writ of habeas corpus in federal district court challenging the admissibility of his statements. Sykes contended he had been too *intoxicated* to understand his "*Miranda*" rights (A. 25). An evidentiary hearing was held, but prior to the hearing Sykes executed a written waiver wherein he waived any contention that his state trial or appellate counsel were ineffective (A. 47).

At the evidentiary hearing, Sykes declined to present any testimony, relying entirely on the state trial record (A. 25). Wainwright (Florida) contended that Sykes had waived the right to present his "Miranda" claim because of his counsel's failure to challenge the admissibility of the statements (A. 25-26).

The district court ruled Sykes was not bound by his counsel's procedural default

and entered an interlocutory order giving Florida ninety days within which to conduct a *Jackson v. Denno*, 378 U.S. 368 (1964), voluntariness hearing (A. 23-31). (This order has been stayed pending appellate review).

Wainwright (Florida) sought permission and was granted leave to file an interlocutory appeal pursuant to 28 U.S.C. § 1292(b) and Rule 5 of the Federal Appellate Rules (A. 32-34). The Fifth Circuit affirmed, holding that Sykes' procedural default did not constitute a waiver even though Florida's procedural rule served a "presumably" legitimate state interest and even though Sykes never alleged or presented evidence of any cause excusing the failure to object (A. 1-18).

Wainwright petitioned the Court for a writ of certiorari and on October 12, 1976, the Court granted review.

SUMMARY

Florida practice requires that a challenge to the admissibility of a confession or admission be made either at or before trial. Failure to so challenge waives the issue. Sykes never challenged the admissibility of his inculpatory statements in trial court. Consequently, under the precepts of *Davis v. United States* Sykes' state procedural default forecloses the granting of federal habeas relief.

Fay v. Noia does not prohibit recognition of this waiver. There are many strategic and tactical decisions, with Constitutional implications, made by counsel, prepatory to and during the course of a trial, that do not require a *Johnson v. Zerbst* waiver. Procedural defaults resulting from these decisions are binding on a federal habeas petitioner in subsequent Title 28 U.S.C. § 2254

proceedings unless the habeas applicant demonstrates cause and actual prejudice excusing the procedural default.

The interpretation of *Jackson v. Denno* by the district court and the Fifth Circuit is erroneous. *Jackson* does not require a trial court to, sua sponte, conduct a voluntariness hearing absent a challenge to the confession. *Jackson* merely requires a forum whereby an accused challenging the admission of a confession can have that issue determined before the statement is submitted to the jury. Florida practice provides such a forum.

Absent a challenge to Sykes' out-of-court statement, a *Jackson* hearing was not mandated. The district court's interlocutory order, as affirmed by the circuit court, giving Florida 90 days within which to conduct a voluntariness hearing and

indicating that the court would grant the writ if a hearing is not held, is erroneous.

ARGUMENT

I

THE FAILURE TO QUESTION THE ADMISSIBILITY OF AN OUT-OF-COURT STATEMENT BARS A STATE PRISONER FROM PRESENTING HIS VOLUNTARINESS CLAIM IN FEDERAL HABEAS PROCEEDINGS WHERE SUCH FAILURE CONSTITUTES A WAIVER UNDER STATE PRACTICE AND WHERE THE HABEAS PETITIONER FAILS TO SHOW CAUSE AND PREJUDICE EXCUSING THE WAIVER.

A. THE STATE PROCEDURAL DEFAULT

Florida practice requires that a challenge to the admissibility of a

confession or admission be made either at or before trial. Failure to so challenge waives the issue. Florida Rule of Criminal Procedure 3.190 (1972) (A. 51), *Thomas v. State*, 249 So. 2d 510 (Fla. 3d Dist. Ct. App. 1971); *Blatch v. State*, 216 So. 2d 261 (Fla. 3d Dist. Ct. App. 1968). Sykes never challenged the admissibility of his inculpatory statements in state trial court. Consequently, at issue before this Court is whether Sykes' state procedural default forecloses the granting of federal habeas relief.

B. THE CONSEQUENCES OF THE DEFAULT UNDER A DELIBERATE BY-PASS ANALYSIS

In *Fay v. Noia*, 372 U.S. 391 (1963), the Court "...narrowly restrict[ed] the circumstances in which a federal court may refuse to consider the merits of federal constitutional claims"[1] in habeas proceedings.

1 Stone v. Powell, ___ U.S. ___, 49 L.Ed. 2d 1067, 1078, 96 S.Ct. ___ (1976).

The Court ruled that the federal district courts should entertain all habeas petitions raising federal questions. It gave district courts limited discretion to refuse to grant relief in cases where there had been a deliberate procedural default in state court. The Court turned to the waiver applied in *Johnson v. Zerbst*, 304 U.S. 458 (1938), as an appropriate benchmark, viz: that the habeas petitioner had intentionally relinquished or abandoned a known right or privilege.

Although *Fay* recognized that there would be other circumstances that would give rise to a waiver, *Fay* has been interpreted as recognizing state procedural defaults only where there has been a *Zerbst* waiver. This latter interpretation has resulted in some courts not only requiring a *Zerbst* waiver in all cases, but in placing the burden on the habeas respondent to demonstrate that

the habeas petitioner deliberately by-passed his state remedies, e.g. *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 143-144 (1976) (Brennan, J., dissenting); *Mottram v. Murch*, 458 F.2d 626, 629 n. 4 (1st Cir. 1972), rev'd, *Murch v. Mottram*, 409 U.S. 41 (1972). This interpretation has evolved because *Fay* made the exercise of the discretion to deny relief the *exception* rather than the *rule*.[2]

Sykes' case illustrates the consequence of this shift in burden. After being charged with murder in the second degree

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2 In fact, Johnson v. Zerbst places the burden on the habeas petitioner. Zerbst said: "...When collaterally attacked, the judgment of a court carries with it a presumption of regularity. Where a defendant without Counsel, acquiesces in a trial resulting in his conviction and later seeks release by the extraordinary remedy of *habeas corpus*, the burden of proof rests upon him to establish that he did not competently and intelligently waive his constitutional right to assistance of Counsel ...." 304 U.S. 458, 468-469 (1938).

he proceeded to trial, aided by counsel, without challenging either at or before trial the admissibility of his out-of-court statements. Sykes testified in his own behalf, but never, during that testimony, did he claim not to have understood his "Miranda" warnings. He appealed his conviction of murder in the third degree, but did not raise the admissibility of his statements in that appeal (A. 25). Sykes subsequently filed his petition in federal district court claiming his confession was involuntary because he was too intoxicated to understand his "Miranda" warnings. A hearing was held, but Sykes did not present any evidence; instead he relied entirely on the state trial transcript (A. 25). The lower federal courts did not require Sykes to prove that he had not waived his claim through procedural default. Ignoring the teachings

of *Zerbst*, which places the initial burden on the habeas applicant, n. 2, supra, they required Florida to prove that Sykes' procedural default was deliberate.

This is an almost impossible burden. Will the habeas petitioner admit that the by-pass was deliberate? Will his state trial counsel testify at the habeas hearing that his motive in not timely objecting was so he could have "two bites at the apple"?[3] If so, he may well have admitted to having violated his ethical responsibilities as an officer of the (trial) court. On the other hand, the decision of the Fifth Circuit in the instant case *would make a lawyer prima facie incompetent if he does timely challenge the admissibility of the confession!* He has nothing to

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3 See Arnold v. Wainwright, 516 F.2d 964 (5th Cir. 1975).

lose, and much to gain for his client, by not complying with a legitimate procedural rule, since he can always challenge it later in a federal forum if the verdict is adverse.[4] Under such an interpretation of *Fay*, it is petitioner who chooses when to litigate his constitutional claim while the state must be prepared to defend against that claim indefinitely.

C. CONSEQUENCES OF THE DEFAULT UNDER A CAUSE - PREJUDICE ANALYSIS

A *Fay-Zerbst* analysis is not the only criteria for determining when a procedural default would preclude a habeas applicant from presenting his constitutional claim in federal habeas proceedings. Procedural defaults by counsel, even without prior

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4 In retrospect it is clear why Sykes concedes his attorney was competent. His attorney foresaw what no one else could have: The Fifth Circuit's conclusion years after trial that pursuing state procedural rules was unnecessary.

consultation with the accused, may in some cases also preclude relief. This is clear from the Court's decisions in *Estelle v. Williams*, ___ U.S. ___, 43 L.Ed.2d 126, 96 S.Ct. ____ (1976); *Francis v. Henderson*, ___ U.S. ___, 48 L.Ed.2d 149, 96 S.Ct. ___ (1976); and *Davis v. United States*, 411 U.S. 233 (1973).

In *Davis*, the Court recognized that a failure to timely raise a substantive constitutional issue, as required by a rule of procedure, may constitute a waiver of that issue, precluding relief in subsequent habeas corpus proceedings. While *Davis* involved a federal prisoner collaterally attacking the racial composition of the grand jury that indicted him, this Court subsequently decided that "...considerations of comity and federalism require..." that the *Davis* waiver ruling should be applied to state prisoners as well.

Francis v. Henderson, ___ U.S. ___, 48 L.Ed. 2d 149, 96 S.Ct. ____(1976). In *Davis* and *Francis*, the Court ruled that the waiver could be excused where the habeas applicant demonstrated both *cause* and *actual prejudice*. Sykes has demonstrated neither.

D. RECONCILIATION OF APPROACHES

One would have to ignore reality not to recognize that there is tension between *Fay* and *Davis*. But they are reconcilable. *Fay* was concerned, primarily, with the *power* of federal courts to consider the merits of federal constitutional claims. *Davis* is concerned with the appropriate exercise of that power.

In *Fay* the Court held, inter alia, that:

> ...A choice made by counsel not participated in by the petitioner does not *automatically* bar relief.... 372 U.S. 391, 439, emphasis supplied.

That statement clearly infers that a *Zerbst* type deliberate by-pass is not the only instance where a procedural default would preclude subsequent habeas relief. *Davis* is a recognition of this interpretation.

If, for instance, the language in *Fay* had been "a choice made by counsel not participated in by the petitioner can *never* bar relief," the following cases would have been wrongly decided because each involved a tactical decision in which the habeas petitioner had not participated: *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973); *United States ex rel. Bruno v. Herold*, 408 F.2d 125 (2nd Cir. 1969); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968).

In *Twomey*, the court said:

> The Court's [*Fay's*] opinion emphasizes the importance of the defendant's participation

> in the waiver decision. It is worthy of note, however, that the Court did not say that a decision made by counsel, in which the defendant did not participate, can never bar relief. On the contrary, the Court stated only that such a decision "does not automatically bar relief." 372 U.S. at 439, 83 S.Ct. at 849. We infer that in some situations the acts of counsel, although not explicitly approved by the defendant, may fairly effect a waiver. 484 F.2d 740, 744

Accord: *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973).

Twomey and the above cases are consistent with the Court's pronouncements that a *Zerbst* waiver is not required in all situations involving constitutional implications. In *Schneckloth v. Bustamonte*, 412 U.S. 218 (1973), the Court said:

> Almost without exception, the requirement of a knowing and intelligent waiver has been applied only to those rights which the Constitution guarantees to a criminal

> defendant in order to preserve a fair trial.... 412 U.. 218, 237.

Examples cited by the Court in *Schneckloth* are: right to counsel, right of confrontation, to a jury trial, to speedy trial and to be free from double jeopardy. See also *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973). Strategic and tactical decisions preparatory to and during trial, even those with constitutional implications,[5] have been left to counsel. *Estelle v. Williams*, supra, n. 3.

E. APPROPRIATE ANALYSIS IN INSTANT CASE

The decision to challenge the admissibility of a confession is a strategic decision left primarily to trial counsel. *Twomey, Curry*, supra, *United State ex rel.*

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5 Strictly speaking, Sykes has not raised a constitutional deprivation. He has, instead, claimed non-compliance with the Miranda prophylactic rule. See Michigan v. Tucker, 417 U.S. 433 (1974).

Terry v. Henderson, 462 F.2d 1125 (1972)[6]

In *Twomey*, the Court stated the question to be:

> . . . whether petitioner waived his constitutional objection to the admissibility of certain evidence as a matter of Illinois procedure, and if so, whether that waiver also forecloses a federal collateral attack on his conviction. 484 F.2d 740, 741.

The evidence in *Twomey* was an in-custody statement. After finding the habeas petitioner's trial counsel to be competent and stating that he was bound by his counsel's trial tactics, the court said:

> . . . So analyzed, we are persuaded that the failure to object at trial to the admissibility of testimony describing petitioner's in-custody statement gave rise to the kind of waiver that should be placed in the same category

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6 This is apparent because on balance a confession may be more self-serving than prejudicial. It may raise a self-defense claim, an insanity claim or even arouse sympathy.

> as a "deliberate by-pass" of state remedies barring subsequent collateral attack in federal courts. 484 F.2d 740, 745.

The Fifth Circuit attempted to distinguish *Twomey* by stating that in *Twomey* the court found that there was a reasonable tactical basis for counsel's failure to object; whereas here the court found none. While we most respectfully disagree,[7] it should be observed that Sykes has conceded his trial counsel

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7 The Fifth Circuit was concerned with the statement made at the scene and not the one at the jailhouse. The court reasoned that initial statements were inconsistent with his self-defense theory at trial (A. 7, n. 4). The record indicates that Sykes came up the road after the officers arrived at the scene and said he shot the decedent (TR. 33 & 45). Such a statement was not inconsistent with his theory of self-defense because in self-defense a criminal defendant has to admit the act and then offer self-defense as an excuse for his act. Furthermore, it is manifest that, as Sykes' counsel obviously realized, the statement was not the product of a custodial interrogation. A "Miranda" warning was not required. Miranda v. Arizona, 384 U.S. 436 (1966).

was effective. If counsel was effective, a tactical purpose must be assumed.

Furthermore, a waiver resulting from a procedural default does not depend on subjective determinations. *Murch v. Mottram*, 409 U.S. 41 (1972). It makes no difference whether it was a "...defense tactic or simply indifference." *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 96 S.Ct. ____ , n. 9 (1976), as long as the facts and legal consequences were known or should have been known by the habeas petitioner's trial counsel.[8] Since Sykes did not present any evidence in the district court to show the decision was not

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8 Florida provides a post-conviction remedy for matters now known to the defendant. Fla. R. Crim. P. 3.850. While that procedure is not available for matters that could have or should have been raised at the trial court and on direct appeal it is available for matters not known to the defendant at the time of trial. State v. Matera, 266 So.2d 661 (Fla. 1972).

tactical, it should not be assumed to have been otherwise.

The approach in *Davis* is fair to both parties: where the state has a procedural rule, failure to timely raise a substantive constitutional issue, as required by the rule, may constitute a waiver of that issue precluding consideration of the federal question in subsequent habeas corpus proceedings, unless the petitioner demonstrates cause and actual prejudice.

The *Davis* waiver approach should be extended beyond the issues in that case. The policy considerations enumerated in *Davis* apply with equal force to "Miranda" claims.

Additionally, there is an even more compelling reason to apply a *Davis* waiver to "Miranda" claims such as this. The reason is suggested by Mr. Justice Marshall's dissent in *Davis*, wherein he comments:

> . . . But when a new trial is required so that an indictment may be returned by a properly constituted grand jury, those difficulties simply do not arise. Nothing in the previous trial must be redone; indeed, the prosecution could present its entire case through the testimony given at the previous trial, if it showed that its witnesses were now unavailable and thus that the alleged difficulties in reprosecution were real. * * * All that the prosecution might lose is the enhancement of credibility, if any, that the actual presence of the witnesses could lend their testimony. 411 U.S. 233, 250, citation omitted.

While Florida most respectfully takes issue with a position that places so little emphasis on the quality of evidence, it wholeheartedly agrees with the suggestion that there is considerable prejudice to the state where evidence is lost. With a "Miranda" claim of this nature, the state may never have an adequate opportunity to develop evidence to refute the claim. If

state witnesses are unavailable when the habeas application is entertained, previous testimony may be inadequate because it did not focus upon the precise issue.

F. APPLICATION OF THE DAVIS APPROACH TO THE INSTANT CASE

If the *Davis* waiver principles are applied in the instant case it is manifest that Sykes' claim should be denied.

(a) FLORIDA'S RULE SERVES A LEGITIMATE STATE INTEREST

The *Davis* approach naturally presupposes that the state procedural rule serves a legitimate state interest. Whether the rule does so serve is itself a federal question to be determined by the federal courts, *Henry v. Mississippi*, 379 U.S. 443 (1965); but in the instant case, the Fifth Circuit recognized that Florida's contemporary objection rule does and did serve a legitimate state interest (A. 12-13).

The policy considerations for recognizing such rules have been enunciated by the Court many times. *Davis v. United States*, 411 U.S. 233 (1973); *Henry v. Mississippi*, 378 U.S. 443 (1965); *Michel v. Louisiana*, 350 U.S. 91 (1955). The instant case exemplifies some of the reasons for Florida's rule. A timely challenge by Sykes would have put Florida on notice of the claim when Florida was best prepared to refute the contention. Florida could not possibly have anticipated the contention at trial because it was not until after his conviction and appeal that Sykes first suggested that he was too intoxicated to understand his "Miranda" rights.

(b) SUFFICIENCY OF CAUSE EXCUSING WAIVER

Sufficiency of cause should, of course, be considered on an ad hoc basis. Case

law has already isolated many factors that may be considered in this cause analysis: *Stone v. Powell*, ___ U.S. ___, 49 L.Ed.2d 1067, 96 S.Ct. ____ (1976) (state fails to provide opportunity for full and fair litigation of the claim); *Fay v. Noia*, 372 U.S. 391 (1963); *Aaron v. Capps*, 507 F.2d 685 (5th Cir. 1975) (grisly choice); *Winters v. Cook*, 489 F.2d 174 (5th Cir. 1973); *Wells v. Wainwright*, 488 F.2d 522 (5th Cir. 1973) (facts upon which substantive claim is based were not ascertainable by reasonable inquiry); *United States ex rel. Allum v. Twomey*, 484 F.2d 740 (7th Cir. 1973); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297 (2nd Cir. 1971); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968) (state trial counsel was ineffective).

It is perhaps redundant to repeat that Sykes has yet to suggest or demonstrate cause excusing his waiver. Until he does

so *Davis* precludes relief.

(c) ACTUAL PREJUDICE

Although Sykes did not demonstrate cause excusing the waiver, the Fifth Circuit refused to apply a *Davis* waiver under the assumption that Sykes had suffered prejudice. It said:

> ...in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent. A. 15

Florida most respectfully takes issue with this assumption. Concededly, in most cases an admission or confession is incriminating, but on balance it may not be prejudicial. To illustrate: a statement made by an accused that "I killed him, but in self-defense" is inculpatory, but not necessarily prejudicial. It might be, when considered with other evidence, more self-serving than incriminating. The

spontaneous statement made by Sykes at the scene that, "I shot Willie" (TR. 45) was not inconsistent with his testimony at trial that he did it in self-defense. Taken together they are not necessarily prejudicial. That an admission or confession cannot in all cases be presumed to be prejudicial has been recognized in many instances. *United States ex rel. Allum v. Twomey*, 48 F.2d 740 (7th Cir. 1973); *United States ex rel. Terry v. Henderson*, 462 F.2d 1125 (2nd Cir. 1972); *United States ex rel. Schaedel v. Follette*, 447 F.2d 1297 (2nd Cir. 1971); *Curry v. Wilson*, 405 F.2d 110 (9th Cir. 1968).

This Court held in *Davis* and subsequently in *Francis* that where there has been a procedural default, prejudice will not be presumed. The Fifth Circuit engaged in what this Court said not to do, i.e., it presumed prejudice.

II

JACKSON V. DENNO, 378 U.S. 368 (1969), DOES NOT MANDATE A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT A CHALLENGE.

The Fifth Circuit reasoned that if the trial judge had, on his own initiative, questioned the admissibility of the statement Sykes would have been put on notice as to his waiver rights. In placing this obligation on the trial judge it interpreted *Jackson v. Denno* as holding that a voluntariness hearing is mandated even where the voluntariness of a confession is not challenged.[9]

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9 The Fifth Circuit cites Stiner v. State, 78 Fla. 647, 83 So. 565 (1919), as authority for the proposition that it has long been the Florida practice to require a trial judge to satisfy himself that an admission or confession is admissible before submitting it to the jury (A. 9-10, n. 7). Whatever may have been the Florida practice

The lower courts misapprehended *Jackson*. In *Jackson*, the Court was concerned with the New York practice under which a question raised about the voluntariness of a confession resulted in submission of that issue to the jury together with the other issues in the case. The procedure violated the principle that a defendant is denied due process of law if his conviction is founded, in whole or part, upon an involuntary confession, since it would be impossible to determine whether the jury was influenced by the involuntary confession.

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in 1919, Fla. R. Crim. P. 3.190 (1972) now requires a challenge, otherwise it may constitute a waiver. It is for Florida to interpret its own laws as long as this interpretation does not violate constitutional principles. Garner v. Louisiana, 368 U.S. 157 (1961). Nevertheless, that part of Stiner relied upon by the Fifth Circuit was pure *obiter dicta* because the court in Stiner sustained the judgment since it found the admissions to have been voluntary.

The Court then held that a criminal defendant objecting to the admission of a confession is entitled to a fair hearing in which the confession's voluntariness is determined before its submission to the jury. The precepts of *Jackson* are satisfied as long as a forum is provided wherein a defendant challenging the voluntariness of a confession can have the issue resolved by the court as a matter of law. Florida provides such a forum through criminal procedure rule 3.190(i) (1972). *Land v. State*, 293 So. 2d 704 (Fla. 1974); *McDole v. State*, 283 So. 2d 553 (Fla. 1974).[10]

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10 Sykes "Miranda" claim cannot be presented via post-conviction relief in Florida because: "If the matter forming the basis of a motion to vacate was known to the defendant at the time of trial, it will not support a collateral attack on the judgment of conviction. This is true whether the matter was litigated at trial, as in the instant case, or withheld and not litigated at trial ...." State v. Matera, 266 So.2d 661, 661 (Fla. 1972).

Consequently his procedural default bars relief at this time.

The Constitution has never required more. In *Lego v. Twomey*, 404 U.S. 477 (1972), the Court recognized that the *Jackson* hearing was only mandated where the defendant challenges the confession when it said:

> In 1964 this Court held that a criminal defendant *who challenges* the voluntariness of a confession made to officials and sought to be used against him at his trial has a due process right to a reliable determination of that the confession was in fact voluntarily given and not the outcome of coercion which the Constitution forbids .... 404 U.S. 477, 478, emphasis supplied.

Similarly, the Court in *Pinto v. Pierce*, 389 U.S. 31 (1967), said:

> ...a defendant's constitutional rights are violated when his *challenged confession* is introduced without a determination by the trial judge of its voluntariness after an adequate hearing.... 389 U.S. 31, 32 emphasis supplied.

In support of its decision, the lower court relies on *Sims v. Georgia*, 385 U.S. 538 (1967). However, there the confession

was *specifically challenged* and the issue was whether the Georgia courts afforded a fair and reliable procedure for determining its voluntariness - not one of a sua sponte obligation on the part of the trial court to determine voluntariness.

The view that *Jackson v. Denno* does not mandate a voluntariness hearing when a defendant does not contest the voluntariness of a confession is generally accepted by lower federal courts. *United States v. Sabin*, 526 F.2d 857 (5th Cir. 1976); *Randall v. United States*, 454 F.2d 1132 (5th Cir. 1972); *Miller v. Cardwell*, 448 F.2d 186 (6th Cir. 1971); *United States ex rel. Lewis v. Pate*, 445 F.2d 506 (7th Cir. 1971); *United States v. Stevens*, 445 F.2d 304 (6th Cir. 1971); *United States v. Carter*, 431 F.2d 1093 (8th Cir. 1970); *Jacobson v. People of California*, 431 F.2d 1017 (9th Cir. 1970); *Sellers v. Smith*, 412

F.2d 1002 (5th Cir. 1969); *Garrison v. Patterson*, 405 F.2d 696 (10th Cir. 1969).

The Fifth Circuit's requirement that a trial judge should, on his own initiative, question the admissibility of a confession so that the accused will be on notice as to his waiver rights, ignores the distinction between the function of the court and that of counsel. The Court has guaranteed to all criminal defendants the right of counsel, *Gideon v. Wainwright*, 372 U.S. 335 (1963). This guarantee is for the protection of the accused; but where the accused is represented by counsel, a court is entitled to rely on counsel to advise a defendant and to make timely assertion of his rights. *Estelle v. Williams*, ___ U.S. ___, 48 L.Ed.2d 126, 134, n. 4 (1976) (Powell, J. concurring). As stated in *Estelle:*

> ...Under our adversary system

> once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system. 48 L.Ed.2d 126, 135.

If counsel is incompetent, a criminal defendant has his remedies; but until he so claims a habeas applicant should generally be bound by his attorney's actions or inactions during the course of or preparatory to trial.

CONCLUSION

For the reasons indicated this petitioner respectfully requests the Court to reverse the holding of the Court of Appeals in and for the Fifth Circuit in this cause.

Respectfully submitted:

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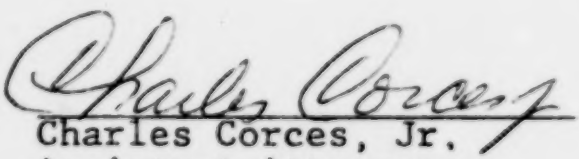
CERTIFICATE OF SERVICE

I. CHARLES CORCES, JR., Counsel for Petitioner, and a member of the Bar of the United States, hereby certify that on the 22 day of November, 1976, I served three copies of the Brief of Petitioner and three copies of the Appendix on William F. Casler, Esquire, 6795 Gulf Blvd., St. Petersburg Beach, Florida 33706, by a duly addressed envelope with postage prepaid.


Charles Corces, Jr.
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General

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 75-1578

LOUIS L. WAINWRIGHT, Secretary, Department of Offender Rehabilitation, State of Florida,

Petitioner,

v.

JOHN SYKES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT

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BRIEF FOR THE RESPONDENT

OPINION BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 528 F.2d 522.

JURISDICTION

The judgment of the Court of Appeals was entered February 25, 1976 (A. 19-20). The Fifth Circuit denied

a timely Petition for Rehearing En Banc on March 22, 1976 (A. 21-22). The Petition for Writ of Certiorari was filed on April 28, 1976, and was granted on October 12, 1976. The Jurisdiction of this Court rests on 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V, Constitution of the United States (A. 50).

Amendment XIV, Constitution of the United States (A. 50).

STATUTE INVOLVED

Title 28 U.S.C. §2254(a)(b) (A. 49).

FLORIDA COURT RULE INVOLVED

PRE-TRIAL MOTIONS RULE 3.190 (1972)

(i) Motion to Suppress a Confession or Admission Illegally Obtained.

(1) Grounds. Upon motion of the defendant or upon its own motion, the Court shall suppress any confession or admission obtained illegally from the defendant.

(2) Time for Filing. The Motion to Suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the Court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) Hearing. The Court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

FEDERAL COURT RULE INVOLVED

Rules 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure provide:

(b) Pretrial Motions. Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * *

(3) Motions to suppress evidence;

* * *

(f) Effect of Failure to Raise Defenses or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the Court pursuant to subdivision (c), or prior to any extension thereof made by the Court, shall constitute waiver thereof, but the Court for cause shown may grant relief from the waiver.

QUESTIONS PRESENTED

1. WHETHER A DEFENDANT IS BARRED, BY THE THEORY OF "PROCEDURAL DEFAULT," FROM CHALLENGING, IN A FEDERAL HABEAS CORPUS PROCEEDING BROUGHT UNDER 28 U.S.C. §2254, THE FAILURE OF THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF A POST-ARREST STATEMENT MADE BY THE

DEFENDANT AS A PREREQUISITE TO ADMISSIBILITY, WHEN THE RECORD FAILS TO INDICATE A KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT, AND WHEN THE TOTALITY OF CIRCUMSTANCES SUGGESTS THAT THE STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*, NOTWITHSTANDING THE FAILURE OF DEFENSE COUNSEL TO RAISE THE ISSUE OF VOLUNTARINESS IN THE TRIAL COURT. (Presented in the Petitioner's Brief and in the Amicus Curiae Brief)

2. WHETHER *JACKSON V. DENNO*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED. (Presented in the Petitioner's Brief)

STATEMENT OF COUNSEL

Since there is a Brief on behalf of the Petitioner and one on behalf of the United States in the form of an Amicus Curiae Brief, Counsel for the Respondent shall combine his response to these two briefs in one brief only. Counsel for Respondent has been Court appointed in the United States District Court, in the United States Circuit Court of Appeals for the Fifth Circuit and in this Honorable Court. Counsel for Respondent was not trial Counsel and did not represent Respondent in any State actions or proceedings.

STATEMENT OF CASE

1. On January 18, 1972, an Information was filed by the State Attorney for the Twelfth Judicial District of

Florida in DeSoto County charging JOHN SYKES, the respondent herein, with second degree murder, in violation of F.S.A. 782.04. Specifically, the Information alleged that on January 8, 1972, respondent "did unlawfully kill WILLIE GILBERT by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, by unlawfully making an assault on the said WILLIE GILBERT with a deadly weapon* * *."

Trial commenced on June 5, 1972. At the jury trial, SYKES was found guilty of third degree murder and was sentenced to a term of ten years in the state prison (A. 24).

During the trial, certain statements made by SYKES were introduced into evidence without any evidence in the record (TR. 16-19; 23; 33; 35-37; 47 and 54) that SYKES was advised of his rights as set forth in *Miranda v. Arizona*; or if he was so advised, he was improperly advised. Furthermore, that he was intoxicated or drunk at the time of questioning (TR. 19; 24; 28; 38; 39; 48; 52; 55 and 59) and if he hadn't been arrested for murder, he would have been arrested for drunkenness (TR. 39).

There was no hearing before the Court regarding the voluntariness of any statements, or whether or not the defendant intelligently and knowingly waived his Constitutional rights since the evidence indicates that he was intoxicated and drunk.

The transcript indicates that SKINNER put the defendant under arrest and then, without advising him of his rights, the defendant made a statement (TR. 45). Later, at the jailhouse, defendant was questioned again and this time read his rights from a card (TR. 54-55) while he was under the influence of alcohol (TR. 48; 52

and 55). Other evidence to indicate that defendant could not knowingly and intelligently waive his rights appears in the transcript as to his drinking (TR. 19 and 24), that he was drunk (TR. 38 and 39), and that he was intoxicated (TR. 59).

All other portions of the transcript are immaterial to the points raised here by the Petitioner and by the United States in its Amicus Curiae Brief.

On June 5, 1972, after his Motion to Set Aside Verdict, Arrest Judgment and Obtain a New Trial, all of which were denied, respondent was sentenced to a term of ten years. His direct appeal to the Second District Court of Appeals of Florida resulted in a per curiam affirmance of his trial court judgment and sentence (A. 6). Following this, the defendant filed a Motion To Vacate (A. 24; 40-41) in the trial court, Petitions for Writ of Habeas Corpus in the Florida District Court of Appeals and the Supreme Court of Florida (A. 24; 40-41) all of which were denied. The Petition for Writ of Habeas Corpus in the Florida Second District Court of Appeals resulted in a per curian. opinion at 275 So.2d 24 (1973).

On April 25, 1973, Petitioner, from prison, filed a Petition for Writ of Habeas Corpus in the United States District Court for the Middle District of Florida (A. 35-37).

The District Court granted an evidentiary hearing and subsequently rendered a detailed written opinion (A. 23-31) ordering a hearing in State Court regarding voluntariness issue.

Following this, Petitioner filed a Petition for Order Amending the Court's Order of January 23, 1975 (A. 32) to allow the Petitioner herein to appeal to the United States Circuit Court of Appeals for the Fifth Circuit. The case was not certified by the Federal District Court, but rather an Order was entered staying the previous order to allow an appeal by Petitioner.

In an excellent logical opinion, the Court of Appeals affirmed the District Court opinion and ordered (A. 1-18) and directed the State to conduct a hearing within 90 days in the same manner set forth by the District Court.

Following this, the Petitioner proceeded in this certiorari action.

SUMMARY

Several matters are completely overlooked in the briefs before this Honorable Court as regards Florida Criminal Rule of Procedure 3.190 (1972) (A. 51), to-wit:

1. Upon motion of the defendant *or by motion of the Court, any* confession or admission obtained illegally from the defendant *shall* be suppressed.

2. Motions to suppress shall be considered prior to trial *unless opportunity did not exist* or defendant was unaware of grounds; *but* the Court may entertain the motion *or* an appropriate objection at trial.

It is obvious that the Florida Rule regarding the admissibility of an illegal confession or admission is geared to comply with the existing law; i.e. that a fundamental constitutional right under the Fifth Amendment will not be presented to a jury in a way to forge an unfair trial for anyone. The Rule provides that either on a motion of the defendant *or the judge*, an improper admission will be suppressed. Furthermore, the Rule sets forth that the motion shall be made before trial *unless opportunity did not exist. However*, the Court may entertain either the motion of the defendant *or the motion of the judge at the trial.* It must be noted that this rule safeguards the admission of illegal confessions which would result in an unfair

prejudicial trial. This Rule is in harmony with Florida case law.

Now, if a look is taken of the Federal Rule ((Rule 12(b)(3) and 12(f)) cited in the Amicus Curiae Brief, it is noted, as follows:

1. This Rule applied to all evidence whereas Florida Rule 3.190(i) applies specifically to confessions and admissions.

2. In Rule 12(b), the word "*may*" is used throughout the Rule rather than "shall," which indicates something less than mandatory.

3. Motions to suppress evidence (not necessarily confessions) *must* be raised prior to trial.

4. There is no provision in the Federal Rule, as there is in the Florida Rule, for the judge on his motion to hold a hearing.

5. The Federal Rule actually states that failure to timely bring forth the matter prior to trial results in a "waiver." The Florida Rule does not even imply such a penalty.

6. However, "for cause shown" the Court "may grant relief from the waiver."

A study of the Florida Rule (A. 51) makes it clear that either the defendant *or the Court* shall make a motion, before trial if possible, to suppress an illegal confession or admission, but at any rate, to protect this substantive right, the Court may entertain the motion *at trial* – either the defendant's motion *or the Court's motion.* There is nothing in the Rule about waiving anything by procedural default. In fact, the Florida Rule, if properly applied would avoid any possibility of a procedural default since the defendant or the Court would make a motion.

The Amicus Curiae Brief of the United States really only turns on one subject – procedural default.

The Petitioner's Brief deals with only two issues:

1. Waiver of and foreclosure of the defendant's right to federal habeas corpus relief and a resultant denial of a fundamental constitutional right due to this failure to object to the admittance of the illegal confession or admission prior to trial or at trial. The Petitioner argues that this failure to object to an intrusion of a basic substantive right prevents federal relief under the precepts of *Davis v. United States.*

2. Defendant's failure to challenge the admittedly unconstitutional entry of a confession prior to or at trial denies a *Jackson v. Denno* hearing which was ordered by the Federal District Court and by the Court of Appeals in this case.

Through the myriad of case law and as well-reasoned by the Order of the District Court and the opinion of the Court of Appeals, it is clear that a fundamental Constitutional right is zealously protected by the Courts of our land for each citizen. Before a confession or admission will be presented to a jury, there must be a Court-determined hearing as to the voluntariness and legality of the confession or admission. Without a precise showing of tactics or strategy that is knowingly and intelligently waived and entered into with the defendant, the failure to object to the entry of an illegal confession will not result in the denial of a fundamental right and will not be deemed waived by procedural default or otherwise.

If the state trial Court allows an illegal confession or admission to come before the jury as evidence, through a lack of the defendant knowingly and intelligently waiving the rights guaranteed on December 15, 1791, the Constitution is flaunted and the federal courts will listen to the person aggrieved and allow relief through federal habeas corpus with a resultant hearing in a State Court that should have been held in the first place.

Davis v. United States is pointed out strenuously by the United States in its Brief, but as pointed out previously, the Federal Rule 12 states specifically that unless a complaint is raised early that a *waiver* exists. The Florida Rule 3.190(i) is totally different and makes no pretext regarding a *waiver*.

Nonetheless, the Court of Appeals stated that in the *Davis* case no prejudice was shown, but that in this case, admission as evidence of a confession or admission unless voluntariness is shown is a fundamental right and violation is inherently prejudicial.

ARGUMENT

I.

WHETHER A DEFENDANT IS BARRED, BY THE THEORY OF "PROCEDURAL DEFAULT," FROM CHALLENGING, IN A FEDERAL HABEAS CORPUS PROCEEDING BROUGHT UNDER 28 U.S.C. §2254, THE FAILURE OF THE TRIAL COURT TO DETERMINE THE VOLUNTARINESS OF A POST-ARREST STATEMENT MADE BY THE DEFENDANT AS A PREREQUISITE TO ADMISSIBILITY, WHEN THE RECORD FAILS TO INDICATE A KNOWING AND INTELLIGENT WAIVER BY THE DEFENDANT, AND WHEN THE TOTALITY OF CIRCUMSTANCES SUGGESTS THAT THE STATEMENT WAS OBTAINED IN VIOLATION OF *MIRANDA V. ARIZONA*, NOTWITHSTANDING THE FAILURE OF DEFENSE COUNSEL TO RAISE THE ISSUE OF VOLUNTARINESS IN THE TRIAL COURT. (Presented in the Petitioner's Brief and in the Amicus Curiae Brief)

A. The Florida Court Rule

The Brief of the Petitioner and Amicus Curiae contend that a "procedural default" arises when the defendant fails to challenge the admissibility of a confession or admission before or at trial resulting in waiver of the defendant's fundamental right. This contention is based on Florida Rule of Criminal Procedure 3.190(i).

First of all, in Florida Rule of Criminal Procedure 3.190(i), it is obvious that the Florida Rule regarding the admissibility of an illegal confession or admission is geared to comply with the existing law; i.e. that a fundamental constitutional right under the Fifth Amendment will not be presented to a jury in a way to forge an unfair trial for anyone. The Rule provides that either on a motion of the defendant *or the judge*, an improper admission will be suppressed. Furthermore, the Rule sets forth that the motion shall be made before trial *unless opportunity did not exist. However*, the Court may entertain either the motion of the defendant *or the motion of the judge at the trial.* It must be noted that this rule safeguards the admission of illegal confessions which would result in an unfair prejudicial trial. This Rule is in harmony with Florida case law.

A study of the Florida Rule (A. 51) makes it clear that either the defendant *or the Court* shall make a motion, before trial if possible, to suppress an illegal confession or admission, but at any rate, to protect this substantive right, the Court may entertain the motion *at trial* – either the defendant's motion *or the Court's motion.* There is nothing in the Rule about waiving anything by procedural default. In fact, the Florida Rule, if properly applied would avoid any possibility of a procedural default since the defendant or the Court would make a motion.

As a result, the Florida Rule regarding confessions and admissions guarantees a Florida defendant that there will be no procedural default.

Petitioner's argument is predicated upon the concept of "procedural default." This phrase appears four times in the "Index" to the Amicus Curiae Brief, and the body of the Brief contains several variations on this same theme. The crux of the argument is that JOHN SYKES was forever barred from asserting his Fifth Amendment right to be protected from compulsory self-incrimination, when he failed to object to the voluntariness of post-arrest statements prior to his trial on a charge of second-degree murder. The argument relies on Florida Rule of Criminal Procedure 3.190(i) and cases from jurisdictions outside the State of Florida for support. The argument fails, however, for three reasons:

1. the language of Florida Rule of Criminal Procedure 3.190(i) places a responsibility on the State and the trial judge, which is co-extensive with the responsibility on the defendant, to determine the voluntariness of inculpatory statements as a prerequisite to their admissibility;

2. this Rule of Criminal Procedure is an embodiment and extension of earlier Florida case law which mandated a determination of voluntariness at trial for almost 60 years, and which accords with federal constitutional principles as set forth in *Jackson v. Denno* and *Miranda v. Arizona*;

3. the argument reasons to an absurdly false conclusion: that a defendant is entitled to federal constitutional rights only if he "mentions" them prior to trial, after which time the defendant is deemed to have "waived" his substantive due process rights by simple inaction.

The wording of Florida Rule of Criminal Procedure 3.190(i) is in the disjunctive. It reads: "upon motion of

defendant *or upon its own motion*, the Court shall suppress any confession or admission obtained illegally from the defendant." (Emphasis added) The Rule contemplates a two-pronged responsibility: upon the defendant to apply for an order suppressing an involuntary confession; and upon the Court to make such a determination if admission-type evidence is offered against the defendant. Obviously, the Rule also contemplates that the determination of voluntariness must be made at trial: first, because a defendant may not be aware that such evidence will be offered against him until trial, even if he is aware of the fact of a prior inculpatory statement; and second, because the first opportunity the Court has to make such a determination, absent a pre-trial Motion to Suppress, is at trial of the case. Subsection (2) of the Rule underscores this interpretation, by providing that the Motion to Suppress (i.e., from the defendant *or* from the Court *ex mero motu*) may be made *at trial or even subsequently*, where "opportunity therefor did not exist *or* the defendant was not aware of the grounds for the motion *or* an appropriate objection at trial." The remainder of the Rule requires the Court to hold a hearing on the facts necessary to decide the issue of voluntariness.

Florida case law and trial practice since 1919, has been consistent in requiring such a procedure, as an absolute prerequisite to admissibility of inculpatory statements. Contrary to the assertion of the Amicus Curiae on page 12 of its Brief, *all* of the cases cited by the Fifth Circuit Court of Appeals have as their "common thread" the unwavering principle that *the burden of securing the determination that a confession was freely and voluntarily given falls initially on the State and then, absent such a predicate, on the trial judge, before the confession may be introduced against the defendant.* In *Stiner v. State*, 78 Fla. 647, 83 So. 565 (1919):

> the failure of defense counsel to object does not relieve the trial judge of the duty. . .to satisfy himself that the admissions were freely and voluntarily made. . . .

The logical conclusion of the Amicus Curiae argument is that a defendant must *insist, affirmatively*, on his right to free speech, to be free from invasion of privacy, to receive a fair and impartial trial, and to have obviously tainted statements excluded from the jury's consideration. Federal case law has uniformly held that the entitlement of a defendant to constitutionally-guaranteed rights *does not* depend on the defendant, but the protection of said guarantees is the primary responsibility of the courts and the judicial system.

The Amicus Brief attempts to convince this Court that Rule 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure should apply to the defendant. In *Young v. State*, Florida, 140 So.2d 97, the Court held that a federal rule governing the admissibility of confessions had never been approved by the Courts of Florida and further stated:

> The rule in Florida requires that a judicial confession be proferred to the trial judge and in the absence of the jury to determine whether or not it was freely and voluntarily made.

B. Failure of Defendant to Object Is Not an Automatic Waiver of Fundamental Rights.

It would appear by the briefs that if a defendant fails to object or challenge an illegal confession or an admission that has come into evidence without its voluntariness being established, he has forever waived a basic substantial, fundamental constitutional right. This is not so!

In a habeas corpus proceeding by a state prisoner seeking relief from custody, the Federal District Court is concerned only with the question of whether or not the defendant has been deprived of any right guaranteed to him under the Constitution and laws of the United States. *Stewart v. Stephens*, 244 F. Supp. 982 (1965). The Court further stated that jurisdiction is *not* affected by *procedural defaults* incurred by Petitioner during State Court proceedings except in rare cases. The rare cases being when the Defendant, after consultation with counsel, has *understandingly* and *knowingly* bypassed the privilege and it appears so in the record.

In Florida, if a defendant shows that he was denied due process, he may collaterally attack his conviction. *Young v. State*, Florida, 177 So.2d 345; *Marti v. State*, Florida, 1964, 163 So.2d 506. In the *Young* case, the Court held that even when the defendant failed to appeal his conviction, there is no procedural default in failing to appeal. It is not equivalent to an express waiver of a constitutional right and will not preclude collateral attack on an unlawful conviction. *Young v. State*, Florida, 177 So.2d 345; *Merritt v. State*, 165 So.2d 245; *King v. State*, 157 So.2d 440; *Fay v. Noia*, 372 U.S. 391. In other words, failure to object or challenge as well as failure to appeal will not foreclose collateral attack as regards a fundamental right.

There are numerous cases which hold that failure to object at trial to a denial of a fundamental right does not act as a procedural default to estop collateral attack. where fundamental error is involved, it is not necessary for the defendant to have objected at trial to preserve his objection for appellate review. *O'Berry v. Wainwright*, Florida, 300 So.2d 740; *Simpson v. State*, Florida, 1968, 211 So.2d 35. In *Gardner v. State*, Florida, 170 So.2d 461, the Court stated that

> The Courts of this State have jealously defended the privilege of one's constitutional rights not to be forced to testify against himself.

and the Court went on to hold that there was no waiver when the defendant failed to object at trial. The failure to object in *Singleton v. State*, Florida, 183 So.2d 245, did not deny the defendant the right to collateral attack where there was denial of due process.

In *Mullins v. United States*, 382 F.2d 258 (1968), the Court said:

> In *United States v. Inman*, 352 F.2d 954 (4 Cir. 1965), decided more than three months prior to Mullins trial we heeded the Supreme Court's teaching in *Jackson v. Denno*, and laid down specific rules to be followed by the federal courts in this Circuit whenever a confession is proferred by the Government. We pointed out that the procedure must be followed "*even though there was no objection.*" 352 F.2d 956 (Emphasis added)

and then the decision continues on to elaborate on the procedure and what the district judge's finding should include.

When a fundamental right is so violated as to infect the due process of law standard, the violation will be reviewed on appeal even in the absence of objection in the trial Court. *Gordon v. State*, 104 So.2d 524.

Even in one case where counsel in trial stated that there was no question as to the voluntariness of the confession and where on the record the district judge did not make an independent finding that the confession was voluntary before submitting it to the jury, the Court held that a *Jackson v. Denno* hearing was necessary. *Curtis v. United States*, 349 F.2d 718 (1965).

In the Fifth Circuit, it was held in *Randall v. United States*, 454 F.2d 1132 (1972) that

> nevertheless federal courts are not spared the burden of examining the merits of an asserted constitutional error raised in a Section 2255 petition simply because the petitioning federal prisoner failed to assert the error on direct appeal. *Kaufman v. United States*, 394 U.S. 217, 89 S. Ct. 1068 (1969)

No objection to testimony was made at any time in *Proctor v. United States*, 404 F.2d 819 (1968) and yet the United States Court of Appeals for the District of Columbia noticed the matter as an error of substantial rights without procedural default and heard it on appeal. The Court said:

> The record now before us is inadequate to support a finding of *valid waiver* under Miranda. Since *no Miranda objection* was made at trial – we notice the Miranda issue on appeal as a "defect affecting *substantial rights*"... Hence, we now remand the case to the District Court for a hearing to determine whether Proctor made his statement to the arresting officer subject to a valid Miranda waiver.

A Petition for Habeas Corpus from a state prisoner was entertained and the Court held that failure to object, by itself, does not constitute the waiver of the right to a hearing on voluntariness of confession.

Generally, except for fundamental error, all errors must be raised on appeal or those errors are waived. The legal thesis is exemplified in *Burse v. State*, Florida, 1965, 175 So.2d 586, where no appeal was taken and the Court reasoned that there the error is a denial of due process affecting a fair trial that the judgment is subject to collateral attack by petition.

Regarding so called "procedural default," one must look at *Hamilton v. Alabama*, 368 U.S. 52, 82 S. Ct. 157, where the Supreme Court of the United States

sustained a collateral attack even though the Alabama law provided that certain defenses must be announced at arraignment or else be waived. The Supreme Court of the United States revised with a holding that "only the presence of counsel could have enabled the accused to plead intelligently at his arraignment."

It is interesting to note that SYKES in the instant case filed a Motion to Vacate in trial court and a Petition for Writ of Habeas Corpus in both the District Court of Appeal of Florida and the Supreme Court. The District Court of Appeal per curiam decision appears at 275 So.2d 24 (1973) and states as follows:

> This petition for writ of habeas corpus raises questions as to admissibility of a confession which was allowed in the trial court against SYKES. On direct appeal this court affirmed *because* the record amply supported the findings.

It is obvious to anyone that the Court looked at the Petition for Habeas Corpus and compared it with its decision rendered on the direct appeal. It is also clear that the District Court of Appeal said nothing about "procedural default" or "waiver." It follows from the cases cited supra that there can be no procedural default or waiver unless there is a clear and convincing tactical decision appearing on the record as a deliberate bypass. The federal district court, the circuit court and the Florida District Court of Appeal did not find procedural default, waiver, or a bypass.

C. Inherent Fundamental Rights Must Be Protected by the Court at Trial to Prevent Denial of Due Process through an Unfair Trial.

The Florida Criminal Rule 3.190(i) provides that confessions or admissions illegally obtained shall be suppressed by the *Court upon the Court's own motion.*

It further provides that the Court may hear the motion at the trial. This rule is in harmony with the trial practice and procedure in Florida as well as following the case law of almost 60 years ago as set out in *Stiner v. State*, Florida 1919, 83 Southern 565, where the Court stated:

> The question of whether admissions and confessions are made freely or voluntarily *is for the Court* to determine, and, to enable it to do this, there should be preliminary investigation *by the court*, and this examination should be made in the absence of the jury. *Harrold v. Oklahoma*, 196 Fed. 47. . . While we think it is best for counsel to interpose objections to the introduction of evidence of admissions or confessions, in order that the court may make the preliminary investigation to determine its admissibility, *that does not relieve the trial judge of the duty* when evidence of this character is sought to be introduced to satisfy himself that the admissions were *freely and voluntarily made before admitting them.* It is a *duty* which the law imposes *upon the court* in order that the prisoner's constitutional right to a *fair and impartial trial* may be protected and preserved, and this *right* should not be made to depend on the skill and alertness of counsel, otherwise courts, instead of being the forum in which justice alone is the object to be attained, would become games played by respective counsel and won and lost according to their skill in playing the game according to the rules.

This is the law of Florida and Florida Criminal Rule 3.190(i) upholds the teachings of *Stiner v. State.*

The premise that a fair trial is a fundamental due process right and should be protected by the Court regardless of whether or not the defendant's counsel objects is maintained in *Akin v. State*, Florida 1923, 98 Southern 609, where it was held that "it is the duty of the trial judge, whether requested or not, to check

improper remarks of counsel to the jury." The Court said that "if the improper remarks are of such character that either rebuke nor retraction may entirely destroy their sinister influence in such a way a new trial should be awarded regardless of the want of objection or exception." A fair trial by only admitting confessions and admissions which the judge has determined voluntary fall into the same category as the *Akin* case. This same holding appears in *Carlile v. State*, Florida, 1937, 176 Southern 862, where it was determined that whether requested or not, the trial judge has a duty to check improper remarks of counsel. If the Court has this duty with or without objection, surely the trial judge has a duty to guard the fundamental right to see that a confession or admission is proper before it is presented to a jury. The Supreme Court of Florida in reversing the judgment in the *Carlile* case stated

> This Court is reluctant to reverse the judgment of the trial court unless convinced that a fair trial was not given. Such a trial is guaranteed by the fundamental law, and we are confronted at all times with our oath to uphold this mandate.

A Florida Supreme Court case on point is found in *Middleton v. State*, Florida, 1974, 295 So.2d 628, where it was found to be "*patent* fundamental error" which warranted extraordinary writ despite per curiam affirmance by the lower appellate court. It was said that

> because the trial court did not conduct a hearing outside the presence of the trial jury on voluntariness of inculpating statements . . . There should be no glossing over the Petitioner's fundamental rights which has long been recognized in Florida law. A new trial appears in order.

The voluntariness of a confession must be determined *by the trial judge* in the absence of the jury. *Dodd v. State*, Florida, 232 So.2d 235; *Graham v. State*,

Florida, 1956, 91 So.2d 662; *Jackson v. Denno*, 1964, 378 U.S. 368, 84 S. Ct. 1774; *Young v. State*, Florida, 1962, 140 So.2d 97. The requirement of the Fourteenth Amendment is that the trial judge make a determination that a confession was freely and voluntarily given before he allows it to be considered by a jury. *McDole v. State*, 283 So.2d 554; *Jackson v. Denno*, supra.

D. The Prosecutor has a Heavy Burden to Demonstrate that any Waivers by a Defendant are made Knowingly and Intelligently.

The state's (prosecutor's) burden of proof in establishing that the Miranda warnings are given, that they were adequate and that waiver was knowing and intelligent is by clear and convincing evidence. *State v. Graham*, Florida, 1970, 240 So.2d 486.

In *Miranda v. Arizona*, 384 U.S. 436, 86 S. Ct. 1602, the Supreme Court said that when a custodial interrogation is undertaken without the presence of an attorney, the State bears a heavy burden to demonstrate that a defendant knowingly and intelligently has waived his right to counsel and his privilege against self-incrimination. Regarding state's burden also see *Reddish v. State*, Florida, 1964, 167 So.2d 858, where the Court held that

> The holdings vary in different jurisdictions. Florida has long adhered to the rule that preliminary to the introduction of an extrajudicial confession it is the State's burden to go forward with the evidence to establish its admissibility. This includes the burden to make a prima facie showing that the confession was voluntarily given. When the State has accomplished this, an accused who denies the voluntariness of the confession must then go forward with evidence to support his position. The

> trial judge then rules on the basis of all the evidence. *Davis v. State*, 105 So. 843; *Nickels v. State*, 106 So. 479; etc. . . .

The prosecution has the burden of proving by a preponderance of the evidence that a confession was freely and voluntarily given. *Lego v. Twomey*, 404 U.S. 447, 92 S. Ct. 619.

The state has a prerequisite to complete before it can introduce a confession. A predicate must be laid. It only seems proper that like many other types of evidence a predicate must be made before the party can enter the evidence. When we are dealing with a right guaranteed by the United States Constitution, there seems to be a mandatory predicate that a confession or admission was freely and voluntarily given and that the right was knowingly and intelligently waived. In *Dodd v. State*, Florida, 1970, 232 So.2d 235, the Court said

> *When the state desires to introduce a confession into evidence*, it has the burden of making a prima facie showing that the confession was the voluntary act of the defendant. *Reddish v. State*, Florida, 1964, 167 So.2d 858; *Young v. State*, Florida, 1962, 140 So.2d 97.

E. There was no Intentional Waiver Resulting in a Deliberate Bypass.

The Petitioner argues here as he did in the United States District Court and in the Circuit Court of Appeals that SYKES intentionally waived his fundamental rights guaranteed by Miranda by failing to object before or at trial and as a result participated in a deliberate bypass. In both the lower court and the federal district court, this argument of the Petitioner was totally and unequivocably denied. Nowhere in the record can such a hypothesis be drawn.

The Supreme Court of the United States has "consistently held that federal court jurisdiction is conferred by the allegation of an unconstitutional restraint and is not defeated by *anything* that may occur in the state proceedings. State procedural rules must yield to this overriding federal policy." *Fay v. Noia*, 372 U.S. 391. The Court said habeas corpus relief may be cut-off to a defendant who has deliberately bypassed the orderly procedure of the state courts and in so doing has forfeited his state court remedies. Here, SYKES, according to the case law thus far cited herein, did not waive his right to review under state law. It has been shown that failure to object or even to appeal an error does not destroy the right to review by direct appeal or by habeas corpus the invasion of a fundamental right – unless, of course, that right was knowingly waived and a deliberate bypass initiated.

Estelle v. Williams, U.S. Supreme Court, No. 74-676, held that a tactical choice will be considered as a deliberate bypass and void any further relief under federal habeas corpus. Here, again, the federal district court and the court of appeals did not find a tactical choice either explicitly or by innuendo.

In *Davis v. United States*, 411 U.S. 223 (1973), it was held that there was procedural default since the defendant failed to raise his complaint timely. The fact that there was no prejudicial harm shown in the record resulted in a denial of relief. *Davis* stands also for the proposition that a procedural default of a fundamental right may be raised later provided there was prejudice to the defendant. In the instant case, as shown in the aforementioned case law, the entry into evidence of a confession or admission with no showing of voluntariness is a fundamental error and prejudice is inherent.

F. Synopsis as to Argument on Point I.

It then "boils down" to this analysis.

First of all, Florida's Rule 3.190(i) is not as restrictive as the Petitioner and Amicus Curiae would have this Court to believe. The Rule provides that should the defendant fail to file a motion and object to an illegally obtained confession or admission, then, *the Court shall* have a hearing on its own motion. The Rule further provides for this to be done *before or at trial.* What the Rule really stands for is the proposition that *all* confessions or admissions before entry as evidence be scrutinized by the Court. How can a confession or admission be determined "illegally obtained" without a Court hearing. The very title of the Rule

> (i) Motion To Suppress a Confession or Admission Illegally Obtained

means precisely that a hearing is mandatory. In a vacuum without investigation through a hearing, no confession could be determined and found "Illegally Obtained." So, the Rule is quite logical when considered

> Upon Motion of the defendant, *or upon its own motion,* the *Court* shall suppress *any* confession or admission obtained illegally from the defendant.

along with the prevailing state law and trial practice as set down in Florida in the case of *Stiner v. State* where it was held that if the defendant does not pursue the matter of seeing that a bad confession or admission is kept from an unfair trial, then the Court has a duty to guard our fundamental rights.

Secondly, the case law, regarding failure to object to such a fundamental subject as a confession or admission, zealously protects the rights of the citizenry. In both collateral attack and on direct appeal, the

courts hold that they both will be heard when a fundamental right is the matter complained of.

Thirdly, it has been pointed out, that the Court must protect erosion of constitutional rights, with or without objection from the defendant. This mandate goes to the very roots of our great love for our freedoms as manifested on December 15, 1791. Case law overwhelmingly indicates that the Court cannot sit and tolerate a violation of anyone's substantive rights.

Fourth and last, evidence generally is never admitted before a jury without the proper predicate having been laid. Then, why, when we are dealing with the Fifth Amendment rights, can the prosecution boldly throw in a confession or admission without the prerequisite predicate having been made for its entry into evidence. A "heavy burden" rests on the state to guarantee this predicate and without it being proper, a confession or admission is improper.

The Miranda case certainly upholds the fact that the "Fifth Amendment is so fundamental to our system of Constitutional rule" that the Court "has always set high standards of proof for the waiver of constitutional rights" and will not tolerate presumptions or innuendos.

Certainly, is it too much to ask that before any confession or admission goes to a jury that it be scrutinized for its legality as evidence? Why does the brief of the Petitioner and Amicus Curiae feel that SYKES in this case should not have been afforded, and now, not granted a mere hearing regarding such a fundamental question? To indulge the Court and prosecution in an hour's time or less to guarantee that a fair trial is afforded an accused – maybe guilty and maybe not guilty, but at least, presumed innocent – is certainly not too much to require in any case.

ARGUMENT

II.

WHETHER *JACKSON V. DENNO*, 378 U.S. 368 (1964), MANDATES A VOLUNTARINESS HEARING WHERE THE ADMISSIBILITY OF A CONFESSION IS NOT CHALLENGED. (Presented in the Petitioner's Brief)

The Petitioner begins argument in the brief at II taking issue with the Fifth Circuit Court of Appeals holding that "it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelligent waiver of his constitutional rights." As stated explicitly in I supra of this brief, that is precisely the case law and trial practice in Florida which is harmonious with Florida Rule 3.190(i). It is of significant importance that Florida has now gone even further in this rationale of protecting fundamental rights by its newly adopted Florida Evidence Code which was approved on June 23, 1976, and which will become effective on July 1, 1977. Pertinent portions of the Code are

90.103

> (2) This act shall apply to both civil and criminal actions brought after the effective date of this act. . .

90.104

> (3) Nothing in this section shall preclude a court from taking notice of fundamental errors affecting substantial rights, *even though such errors were not brought to the attention of the trial judge.*

Again in this Code, we see *Stiner v. State*, supra, being adhered to and enforced. The Florida Rule 3.190(i) provides the same procedure as does Florida

Evidence Code 90.104(3) to be effective in July. So, here we have the Legislature of the State of Florida codifying the procedure that has existed in Florida for years.

In the Argument under I of this brief, case after case plus Florida Rule 3.190(i) was presented to show that there can be no waiver in a trial in Florida of a substantive right.

Although the judge need not make formal findings of fact or write an opinion, his conclusion that the confession is voluntary *must appear from the record with unmistakable* clarity. *Sims v. Georgia*, 385 U.S. 538, 87 S. Ct. 639.

In the instant case, not only did the state fail to carry its heavy burden in showing affirmatively, on the record, that the statements introduced were voluntarily made, but that the waiver principles enunciated in *Fay v. Noia*, 1963, 372 U.S. 391, 83 S. Ct. 822, make it plain that constitutional rights of such fundamental importance as those considered here may only be waived by the defendant himself, deliberately, and not by his attorney, without his personal knowledge or a procedural forfeit.

Of course, in this case, we must be sure that we are talking about two distinct waivers: the question of waiver of *Miranda* rights at the time of arrest; and the question of the waiver of the right that *Miranda* was designed to safeguard at time of trial.

The fundamental nature of the Fifth Amendment rights have been echoed over and over again for almost two hundred years. When an *inherently personal, fundamental right* of a defendant is at stake, it has been said that only a *personal waiver* of such a constitutional right can be binding and effective against a defendant, as a matter of federal constitutional law. *Winters v. Cook*, 489 F.2d 174, 179 (5th Cir., 1973), citing

"Developments and The Law – Federal Habeas Corpus," 83 Harv. L.R. 1038, 111, n. 102 (1970).

In one of the principal cases cited by the Petitioner, *United States, ex rel. Allum v. Twomey*, 484 F.2d 470 (7th Cir., 1973), the Court cited the *Fay v. Noia* doctrine as it applied to *substantive personal rights*, and emphasized "the importance of the defendant's participation in the waiver decision . . . with respect to major decisions, such as the entry of a guilty plea, *the waiver of the privilege against self-incrimination*, or the decision not to appeal, which are appropriately made *only with a full understanding of the consequences*. . ." 484 F.2d at 744, n. 9 (Emphasis added). This opinion falls into a longstanding legal principle, that the attorney without *express* authority may not surrender or compromise substantive rights of a client and that any attempt to do so will not be reviewed in the courts. 7 Am. Jur. 2d *Attorneys at Law* Sec. 120-122 (1963).

The validity of a waiver of constitutional rights depends upon its meeting the test of having been *completely voluntary and knowingly and intelligently* made. *Miranda v. Arizona*, 374 U.S. at 379. Thus, the standard for waiving rights under Miranda should be as stringent in the courtroom to waive the defendant's right to object, i.e. it must be done with his personal consent, on the record, knowingly, intelligently, voluntarily and with a defendant being apprised of the consequences of such a waiver.

> In *Proctor v. United States*, 404 F.2d 819, the court said
>
> The *record* now before us *is inadequate* to support a finding of valid waiver under Miranda. *Since no Miranda objection was made at trial* – we notice the Miranda issue on appeal as a "defect affecting substantial rights. . .Hence we remand. . .for a hearing. . ."

There is nothing in the SYKES' trial record to show a finding of valid waiver of Miranda, and therefore, even though there was no objection as in the *Proctor* case, there should be a hearing on voluntariness of waiver.

Naturally, one of the premises of this case has to do with voluntariness. The validity of the waiver of the right to remain silent depends upon it being voluntarily, knowingly and intelligently made. *Franklin v. State*, Florida, 1975, 324 So.2d 187; *Nunez v. State*, 227 So.2d 324; *Stewart v. Stephens*, 244 F. Supp. 982 (1965). There are hundreds of cases on this point throughout the United States – federal and state – which stand for this premise.

"It has been pointed out that 'courts indulge every reasonable presumption against waiver of fundamental constitutional rights' and that we 'do not presume acquiescence in the loss of fundamental rights. A waiver is ordinarily an *intelligent* relinquishment or abandonment of a *known* right or privilege.'" *Johnson v. Zerbst*, 304 U.S. 458

Now, then, the Petitioner contends that there was a deliberate bypass by SYKES precluding him from a *Jackson v. Denno* hearing. Nowhere in the record is there one iota of evidence of a bypass. The district court, in its written opinion, states in exceptional circumstances

> some strategic decision at trial can preclude an accused from later asserting a constitutional claim on federal habeas corpus. *Henry v. Mississippi*, 379 U.S. 443, 451-452, 85 S. Ct. 564, 569 (1965); *Fay v. Noia*, 372 U.S. 391, 439, 83 S. Ct. 822, 849 (1963); *Winters v. Cook*, 489 F.2d 174, 176-180 (5th Cir., 1973). Other than the *bold assertion*, however, Respondent has pointed to nothing *in the record* and has adduced no evidence here that would demonstrate the kind of *exceptional*

> *circumstances* recognized in the authorities as constituting a waiver. Clearly, therefore, it would be error for the Court to give effect to Respondent's contention *on this record.*

And then, the Fifth Circuit stated relating to bypass in the instant case that

> The failure to object in this case cannot be dismissed as a trial tactic, and thus, a deliberate bypass. Aside from the state's bare allegation that such was the case, without suggestion of the slightest tactical benefit, there is nothing here present upon which to speculate that the defendant's failure to object to the introduction of SYKES' statement was a strategic decision. We can find no possible advantage which the defense might gain, from the failure to conform with Florida Criminal Procedure Rule 3.190(i).

Again, of course, it must be pointed out that the Florida Rule provides a responsibility not merely for the defendant's counsel but also for the Court – on its own motion – to protect the defendant's fundamental rights. Then, too, a proper predicate for the prosecutor to enter a confession or admission must be a showing of voluntariness.

A deliberate bypass of a fundamental right for tactical reasons which is made by counsel with the knowledge and consent of defendant and with the defendant being aware of the consequences of his waiver of a Fifth Amendment right would foreclose a *Jackson v. Denno* hearing.

However, failure to object by itself, does not constitute waiver of the right to a hearing on the voluntariness of a confession except in *certain circumstances* where a *deliberate bypass* of the right to question the voluntariness for trial tactics. *United States ex rel. Cruz v. LaVallee*, 448 F.2d 671 (2d Cir., 1971). The Court said that "*when the record* of the state trial

court *clearly and beyond doubt* shows a *deliberate bypass*," then a hearing in this case is totally void of a bypass and the federal district court and circuit court so held.

Also, in *Stewart v. Stephens*, 244 Fed. Supp. 982 (Arkansas, 1965), it was stated that an action in District Court for habeas corpus proceedings is not affected by procedural defaults incurred by the Petitioner during state court proceedings *except in rare instances* when he, *after consultation* with counsel or otherwise, has *understandingly* and *knowingly* bypassed the privilege of seeking to vindicate his federal claims in state courts.

In this case, the transcript of the trial raises the voluntariness question vividly and "flags" the question for the trial court's requirement of investigation into the issue before allowing entry of a confession or admission to the jury. Throughout the state's case at the trial, the matters of alcohol, whisky, intoxication and the defendant being so drunk that if he weren't arrested for murder, he would have been arrested for drunkenness, came into evidence. No voluntariness predicate was laid by the prosecutor and no voluntariness hearing was afforded the defendant! Surely, such testimony that the defendant may have been incompetent at the time that he made statements would "flag" the matter.

Testimony of drunkenness at the time of a confession certainly should "trigger" or "flag" the question of voluntariness. *Townsend v. Sain*, 372 U.S. 293 (1963). In 1964, the Florida Supreme Court in *Reddish v. State*, 167 So.2d 858, reversed a murder conviction for the reason that the confessions obtained from the defendant on the day he was in serious physical condition and had been given several doses of narcotics to relieve pain were not obtained in a manner

consistent with constitutional standards against compulsive self-incrimination and were inadmissible. The Court said that there was no clear-cut testimony regarding mental condition at the time he gave the statements. Based on this 1967 case, it would seem that when testimony started coming in regarding the drunken condition of SYKES that the trial judge, irrespective of his duty in the first place, would see the "flag," excuse the jury, require either the prosecutor to lay a proper predicate or inquire *on the record* whether or not the defendant was *deliberately bypassing* his fundamental right.

Subsequent to the reversal in the *Reddish* case, supra, the appellee requested, that the Supreme Court of Florida modify its original opinion by eliminating the following:

> It was the state's burden to prove that the confession was freely and voluntarily obtained.

It is so obvious what the Florida law is as respects this question that there should be no doubt as to the Florida procedure that *only* with a proper predicate by the prosecutor can a confession come in; and in reply to the request, in *Reddish* by the State to modify its opinion the Court specifically and unequivocably reinforced its previous holding and said

> (17) The holdings vary in different jurisdictions. Florida has long adhered to *the rule that preliminary to the introduction of an extrajudicial confession it is the state's burden to go forward with the evidence to establish its admissibility.* This includes the burden to make a prima facie showing that the confession was voluntarily given. *When the state has accomplished this, an accused who denies the voluntariness of the confession must then go forward with evidence to support his position. The trial judge then rules on the basis of*

all of the evidence. Davis v. State, 90 Fla. 317, 105 So. 843; *Nickels v. State*, 90 Fla. 659, 106 So. 479; *Cawthon v. State*, 118 Fla. 394, 159 So. 366; *Bates v. State*, 78 Fla. 672, 84 So. 373; *Welsh v. State*, 122 Fla. 83, 164 So. 835; *Whitten v. State*, 86 Fla 111, 97 So. 496; *Sims v. State*, 59 Fla. 38, 52 So. 198; *Louett v. State*, 152 Fla. 495, 12 So.2d 168.

The divergent rules of the various courts are revealed by the following: Wharton, Criminal Evidence, 12th Ed., Section 352; *Commonwealth v. Dascalakis*, 243 Mass. 519, 137 N.E. 879, 38 A.L.R. 113, and *McLemore v. State*, 181 Ga. 462, 182 S.E. 618, 102 A.L.R. 634.

The respondent does not otherwise question our original opinion. The petition for modification is, therefore, denied.

It is so ordered. (Emphasis added)

There was no waiver in the instant case which resulted in a deliberate bypass, and SYKES is entitled to a *Jackson v. Denno* hearing as was held by both the United States District Court for the Middle District of Florida and by the United States Court of Appeals for the Fifth Circuit.

SYNOPSIS OF ARGUMENT AS TO POINT II

A *Jackson v. Denno* hearing is mandated in this case since there was never a voluntariness hearing as regards SYKES' confession or admission. Counsel for the defendant, the prosecutor and the Court have a duty to guard our constitution and to prevent erosion of fundamental rights. The law in Florida provides this standard before a confession or admission can be entered for jury evaluation.

Here, with the testimony of drunkenness by the defendant, everyone should have been aware of the

great necessity to investigate the question of competency to waive any rights by SYKES.

There is not much to say about deliberate bypass because there was nothing in the record to establish this fact. As a result, there is no deliberate bypass, and therefore, no exception to the holding of *Jackson v. Denno.*

The question of the *Davis* rule is immaterial here since in *Davis* it was question challenging the grand jury composition and the court held that prejudice must be shown. However, in this case, the confession was presented to the trier of facts – the jury – and there was inherent prejudice which is protected by the Fifth Amendment. The *Davis* case, relied upon so heavily in the Amicus Curiae Brief, can certainly be distinguished and is inapplicable in the SYKES case presently before the Court.

CONCLUSION

For the reasons indicated in this brief, the Respondent respectfully requests that this Honorable Court uphold and affirm the opinion of the United States Court of Appeals for the Fifth Circuit which approved of the decision of the United States District Court for the Middle District of Florida.

Respectfully submitted,

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No. 75-1578

In the Supreme Court of the United States

OCTOBER TERM, 1976

LOUIE L. WAINWRIGHT, SECRETARY, DEPARTMENT OF OFFENDER REHABILITATION, STATE OF FLORIDA, PETITIONER

v.

JOHN SYKES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

ROBERT H. BORK,
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v.

JOHN SYKES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

QUESTION PRESENTED

Rule 3.190(i) of the Florida Rules of Criminal Procedure provides that a motion to suppress any confession or admissions must be made prior to trial, unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion. This case presents the question whether a defendant who failed to make a timely pretrial motion to suppress a post-arrest statement on the grounds that it was obtained in violation of *Miranda* v. *Arizona* may raise the claim in a habeas corpus proceeding pursuant to 28 U.S.C. 2254.

INTEREST OF THE UNITED STATES

The case raises an important issue regarding the availability of federal habeas corpus when a defendant has failed to comply with a procedural rule requiring that objections to the admissibility of statements be made prior to trial. Rule 12(b)(3) of the Federal Rules of Criminal Procedure, which was promulgated by this Court and enacted into law by Congress, contains a provision similar to the Florida rule. The holding of the court of appeals, permitting respondent to challenge the admissibility of his confession despite his failure to raise the claim in the manner prescribed by the state rule, is based on principles generally applicable to habeas corpus applications. The decision in this case accordingly will control the availability of collateral relief to federal prisoners who raise similar claims for the first time by motion under 28 U.S.C. 2255 and seek to avoid the procedural bar of Rule 12. The interest of the United States in the resolution of this issue is apparent.

RULES INVOLVED

Rule 3.190 of the Florida Rules of Criminal Procedure (33 F.S.A., p. 265 (1975)) provides in pertinent part:

> (i) *Motion to Suppress a Confession or Admissions Illegally Obtained.*
>
> (1) *Grounds.* Upon motion of the defendant or upon its own motion, the court shall suppress any confession or admission obtained illegally from the defendant.

(2) *Time for Filing.* The motion to suppress shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial.

(3) *Hearing.* The court shall receive evidence on any issue of fact necessary to be decided in order to rule on the motion.

Rules 12(b)(3) and 12(f) of the Federal Rules of Criminal Procedure provide:

(b) *Pretrial Motions.* Any defense, objection, or request which is capable of determination without the trial of the general issue may be raised before trial by motion. Motions may be written or oral at the discretion of the judge. The following must be raised prior to trial:

* * * * *

(3) Motions to suppress evidence; * * *

* * * * *

(f) *Effect of Failure to Raise Defenses or Objections.* Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver.

STATEMENT

1. On January 18, 1972, an information was filed by the State Attorney for the Twelfth Judicial District of

Florida charging John Sykes, the respondent herein, with second degree murder, in violation of 22 F.S.A. 782.04 (1964). Specifically, the information alleged that on January 8, 1972, respondent "did unlawfully kill WILLIE GILBERT by an act imminently dangerous to another and evincing a depraved mind regardless of human life, although without any premeditated design to effect the death of any particular individual, by unlawfully making an assault on the said WILLIE GILBERT with a deadly weapon * * *."

Trial commenced on June 5, 1972. The evidence at trial quite plainly established that the respondent, John Sykes, killed Willie Gilbert with a shotgun on January 8, 1972. The issue at the trial centered on the circumstances surrounding the events of that day and the question whether the homicide was committed in self-defense.

The Case-in-Chief. The principal witnesses for the State were the law enforcement officers who responded to a call to investigate a homicide at respondent's mobile home at approximately 7:40 on the evening of January 8, 1972. The first to arrive at the scene were Deputy Sheriffs Skinner and Grethan.

Deputy Skinner testified that when he arrived at the scene he found Willie Gilbert lying on the ground in the yard, near his car and approximately ten feet in front of respondent's trailer (Tr. 42–43). While Skinner was examining the body, respondent's wife, who "was pretty well shook up [and] hysterical" (Tr. 24), came up to him and stated that respondent had

shot Gilbert (Tr. 44). Respondent then came across the road and said to Deputy Skinner: "I shot Willie" (Tr. 45). Respondent was then placed under arrest, and Mrs. Sykes retrieved the 12-gauge shotgun and shell casing from the trailer (Tr. 45–46).

Shortly thereafter, at approximately 8:20 or 8:30, p.m., respondent was questioned at the DeSoto County Jail (Tr. 47). After being advised of his rights, and apparently after giving a false exculpatory statement suggesting that Willie Gilbert had shot himself with the shotgun accidently while "tussling with it" (Tr. 17),[1] respondent admitted that he had shot Willie Gilbert. Respondent said that Gilbert came to his trailer and was playing around with his gun; he told Gilbert to put the shotgun down, "so Willie put it down and went into the yard." Respondent said that he followed him out to the yard and "that Willie turned around and patted his butt at him like this and (I shot him)" (Tr. 48).

On cross-examination, Deputy Skinner was questioned in detail about the circumstances surrounding the confession. Specifically, Deputy Skinner related that he had advised respondent "what he was under arrest for" and read from a card the following statement (Tr. 54–55):

> You have the right to remain silent. If you do say something we can and will use it against you in a Court of law. You have the right to

[1] This exculpatory statement was testified to by another law enforcement officer who was present for only part of the interrogation (Tr. 16–17). For some reason not apparent in the record, neither Deputy Skinner nor Deputy Grethan, who were doing the interrogating (Tr. 47), testified to this statement.

> any attorney and to have him present at any time you wish to talk to us. If you cannot afford an attorney, one will be furnished free of charge before we question or talk to you. You may just stop answering or discussing the matter at any time. Do you understand what I have told you? Do you wish to talk to us now without a lawyer?

According to Deputy Skinner, respondent indicated that he did not want a lawyer and said that "he wanted to talk to us" (Tr. 55), although he was unwilling, after telling the officers what happened, to sign a written statement (Tr. 35).

Respondent's counsel elicited from Deputy Skinner the fact, which had also been elicited from other witnesses (Tr. 39), that respondent was under the influence of alcohol at the time of his arrest (Tr. 55). No motion was made, however, either prior to or during trial, to suppress Skinner's testimony regarding respondent's statements.

The other evidence in the prosecution's case-in-chief was largely corroborative of Deputy Skinner's narrative (Tr. 35–37). Moreover, the prosecution, apparently anticipating a defense based on self-defense, attempted to show that Willie Gilbert was not armed and that no weapons were found on him or in the area of the yard where he was lying (Tr. 15, 21, 33, 44). On the other hand, respondent's lawyer attempted through his cross-examination to lay the groundwork for the defense case that was to come. Not only did he elicit the fact that the deceased

and the respondent had both been intoxicated at the time of the shooting (Tr. 24, 28, 38, 48, 59), but he brought out that respondent had a jagged cut between his thumb and his forefinger (Tr. 18), a wound that respondent would testify (Tr. 65–66, 70) he had received in a pre-shooting scuffle with Willie Gilbert (who he said had a knife in his hand). A doctor who was called to the scene of the crime testified, however, that it did not appear to him that the wound was caused by a sharp blade (Tr. 59).

The Defense. The respondent testified that he and his wife had arrived home about six o'clock on the evening of January 8, 1972, and that he had been drinking a little bit during the day (Tr. 62). After they got home, and while respondent was having dinner, Willie Gilbert, who was a friend and sometime employer of respondent, came to his house looking for his wife. Respondent said that he told Gilbert that he had not seen Gilbert's wife for weeks. Gilbert then accused respondent of lying (Tr. 62–63), whereupon, according to respondent, the following events took place (Tr. 63–65):

> He went from the living room and picked up the gun.
>
> He came down. He said, "That is the way I want it." He was talking to me, he said, "You stopped working for me and went to working for a cracker." I said, "I don't owe you anything. I can work for who I wants to."
>
> He said, "You ain't going to work for a cracker." When I stood up he backed up with

> the gun. He said, "I'll blow your God-damn brains out, you and your wife." I said, "I ain't do you like that."
>
> * * * * *
>
> [W]hen I jumped from the table I ran into him. He came around with the gun. I caught the gun. He reached back trying to get this knife, and that is the time Willie went over to the refrigerator. He jumped out the door. He said, "You mother fucker, I am going to show you something." He ran from the house. I stepped over to the utility door and opened the screen door and shot him. I told my wife to go call the law because I shot him. She said, "You are joking." I said, "I ain't." I sat down to the table to eating. My wife went and I went to see that my wife called the law.

In response to questions by his attorney, respondent explained that, at the time he fired the shot, Gilbert was coming back toward him (Tr. 66):

> Q. Was Willie heading toward you?
>
> A. He was coming back. He come back running.
>
> Q. Did you think he had a gun or a weapon?
>
> A. He told me, "Wait, you God-damn son-of-a-bitch, you wait until I come back, I will show you something." I didn't give him a chance to go out there and come back on me.
>
> Q. Had Willie threatened you before?
>
> A. No, sir.

The respondent also testified that he knew that Willie Gilbert carried a shotgun and that he had believed that his life was in danger at the time he shot Gilbert (Tr. 69). Respondent admitted, however, that

it was he who had a prior conviction for aggravated assault with a pistol and for subsequent unlawful possession of a firearm (Tr. 74–75), although he testified that he was employed at the time of Gilbert's slaying and had been out of trouble since his release (Tr. 71–73).

Respondent's wife then took the stand in an effort to corroborate some of his testimony, although she did not see Gilbert when the shotgun went off (Tr. 82). Moreover, she did not hear any of the conversation that immediately preceded the shooting (Tr. 91). Several other witnesses, mainly friends of respondent, were also called to show that Gilbert had in the past carried a shotgun (Tr. 100) and a pistol (Tr. 106) and had threatened to use a firearm against them or persons related to them.

2. After being instructed on the elements of the crime and of the defense of self-defense, the jury convicted the defendant of the lesser included offense of third degree murder, *i.e.*, the unintentional killing of another without premeditated design to effect death, in the commission of a felony other than certain specified serious offenses. On June 5, 1972, after his motion to set aside the verdict, arrest judgment and obtain a new trial was denied, respondent was sentenced to imprisonment for a term of ten years. He then appealed to the Second District Court of Appeal of Florida assigning six separate grounds of error, none of which related to the admission of his post-arrest statements. The conviction was affirmed, and certiorari was denied by the Supreme Court of Florida (A. 24).

Respondent thereafter filed a motion to vacate the judgment of conviction pursuant to Fla. R. Crim. P. 3.850. The motion, which apparently raised the issue regarding the admissibility of his post-arrest statements, was denied without any published opinion (A. 24; A. 40–41). Subsequently respondent filed a motion for a writ of habeas corpus in the Second District Court of Appeal of Florida. This application was denied in a brief *per curiam* opinion on the apparently erroneous ground that the issue had been raised and decided on the direct appeal from the judgment of conviction. *Sykes* v. *State,* 275 So. 2d 24. A similar petition was filed in the Supreme Court of Florida and was denied without a published opinion (A. 40).

3. On April 25, 1973, respondent filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of Florida (A. 35–46). The petition alleged that the statements made by him to the deputy sheriffs were improperly admitted at trial because respondent was intoxicated at the time he made them and was therefore incapable of understanding the *Miranda* warnings that had been given (A. 24–25). However, respondent expressly waived "any contention or allegation as regards ineffective assistance of counsel" at his trial (A. 47).

The district court held that the failure of the respondent to raise the issue regarding the admissibility of the post-arrest statements did not bar habeas corpus relief. The court observed that "[i]n exceptional circumstances, some strategic decisions at trial can preclude an accused from later asserting a constitutional

claim on federal habeas corpus," but it found no such circumstances in this case (A. 26). The district court apparently did not consider the effect of Fla. R. Crim. P. 3.190, which requires assertion of such claims prior to trial. Because the trial record was incomplete on the issue whether respondent understood the *Miranda* warnings, the district court agreed to stay its determination of the habeas corpus petition on the condition that a full blown hearing on the issue of the voluntariness of the confession, as prescribed by *Jackson* v. *Denno,* 378 U.S. 368, be afforded respondent by the State of Florida (A. 29–30). The district court certified the case to the Court of Appeals for the Fifth Circuit, however, to permit review of the interlocutory order (A. 32), and the court of appeals agreed to hear the appeal (A. 4).

4. The court of appeals affirmed the order of the district court and directed the State to conduct a hearing within 90 days to determine "whether Sykes was properly apprised of his *Miranda* rights, and understood and knowingly waived those rights at the time he made the incriminating statements used against him" (A. 18). The route taken by the court of appeals to reach this conclusion is not entirely clear.

The court began its opinion by observing that generally, before a confession or admission is allowed into evidence, "it is incumbent upon the trial judge to determine the voluntariness of the statements involved, and the defendant's knowing and intelligent waiver of his constitutional rights" (A. 8–9) and that

a defendant "is entitled to a hearing on the issue of voluntariness as a matter of procedural due process" (A. 9). The court then observed that in Florida "[t]he burden is on the State to secure this prima facie determination of voluntariness [by the trial judge], not upon the defendant to demand it" (A. 9–10), although of all the Florida cases cited to support this conclusion, only one case, *Stiner* v. *State,* 78 Fla. 647, 83 So. 565, decided almost a half-century prior to the adoption of Fla. R. Crim. P. 3.190, actually so held. Indeed, one of the cases cited by the court of appeals, *Dodd* v. *State,* 232 So. 2d 235, 238, clearly suggests that a timely objection is a prerequisite to obtaining appellate review of the admissibility of a confession.

Having thus defined "the nature of the right" (A. 7), the court of appeals then considered the effect of Rule 3.190(i)(2), which requires a defendant to make a motion to suppress evidence prior to trial "unless opportunity therefore did not exist or the defendant was not aware of the grounds for the motion," although "the court in its discretion may entertain the motion or an appropriate objection at the trial" (A. 5). The court of appeals held that Rule 3.190 would not bar habeas corpus relief in the absence of a deliberate bypass by the defendant or a tactical decision by counsel to forgo the objection. Moreover, the court distinguished this case from *Davis* v. *United States,* 411 U.S. 233, which held that the failure to make a timely challenge to the racial makeup of the grand jury, as required by Fed. R. Crim. P. 12(b)(2), pre-

cluded a petition for a writ of habeas corpus. It stated that "[a] major tenet of the *Davis* decision was that no prejudice was shown to petitioner through the loss, or waiver, of his rights to challenge jury composition," while "in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent" (A. 14, 15).

The court of appeals concluded by again taking note of the trial judge's failure *sua sponte* to compel the State to show that the post-arrest statements were admissible (A. 17). It observed that had he done so the respondent "would have been on notice as to the waiver of his rights, and Rule 3.190(i) might now foreclose him from bringing additional or subsequent arguments regarding the admissibility of the statement in question" (A. 17). Accordingly, "[b]ecause the trial afforded appellee in this case did not conform to procedural requirements, long established, that the trial judge must assure himself of the admissibility of the criminal defendant's statements, we refuse to construe Rule 3.190(i) as foreclosing Sykes' opportunity to challenge the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights" (A. 17).

SUMMARY OF ARGUMENT

This case involves the right of a state prisoner to complain in a habeas corpus proceeding under 28 U.S.C. 2254 about the admissibility of post-arrest statements made by him, which were admitted at his

trial without objection, and which had allegedly been obtained without procuring the knowing and intelligent waiver of rights required by *Miranda* v. *Arizona*, 384 U.S. 436, to make the statements admissible at trial. Because the State of Florida, where respondent stood trial and was convicted, has enacted a procedural rule requiring such issues to be raised by motion prior to trial and refuses to consider them when presented for the first time on appeal or in a collateral proceeding, the question squarely raised is the extent to which it is appropriate for a federal district court to grant habeas corpus relief, based on this kind of claim, in the face of such a state procedural bar.[2]

1. The proper standard for assessing the availability of federal habeas corpus in such circumstances is not, as the court of appeals held, whether the respondent "deliberately by-passed" or "understandingly and knowingly" waived his right to object to the admissibility of such statements (see *Fay* v. *Noia*, 372 U.S. 391, and *Johnson* v. *Zerbst*, 304 U.S. 458),

[2] The opinion of the court of appeals appears to rest in some measure on its construction of Fla. R. Crim. P. 3.190(i) as not "foreclosing [in circumstances here] Sykes' opportunity to challenge [in a habeas corpus proceeding] the voluntariness of the statements admitted, and the concomitant waiver of *Miranda* rights" (A. 17). The courts of Florida, however, have held that the failure to raise this issue in a timely fashion constitutes a waiver foreclosing appellate review (Pet. Br. 8–9), and that an issue, if "known to the defendant at the time of trial," cannot be raised in a collateral proceeding. *State* v. *Matera*, 266 So. 2d 661, 666 (Fla. Sup. Ct.). Moreover, they have likewise declined to consider respondent's applications for collateral relief. Under these circumstances, the court of appeals' view of Florida law seems plainly mistaken.

but whether he has shown "cause" sufficient to justify the extraordinary relief he seeks. This more rigorous standard was established by *Davis* v. *United States,* 411 U.S. 233, which held that the requirement of Rule 12, Fed. R. Crim. P., that certain claims be raised before trial barred collateral relief even though there had been no knowing and deliberate waiver by the defendant of his pretrial right to object to the composition of the grand jury that indicted him; the same standard was applied to Section 2254 review of state convictions in *Francis* v. *Henderson,* 425 U.S. 536. It governs this case.

We further submit that, even apart from the impact of the Florida procedural rule explicitly requiring pretrial submission of claims for suppression of evidence, the prosecution should not be required to show a knowing and deliberate waiver in order to bar consideration in collateral attack proceedings of such claims when they have not been raised at trial. *Zerbst* involved the waiver of the right to the assistance of counsel at trial, and *Fay* involved a failure to preserve by appeal the right to attack the voluntariness of an allegedly coerced confession that provided the sole evidence upon which the defendant had been convicted. The rights being "waived" in both cases, especially the former, cut directly to the heart of the fairness of the trial proceedings. Both cases involved interests considerably different from the interests served by the *Miranda* rules, and this difference justified freer access to collateral inquiry into the validity of the convictions.

In the case of *Miranda* claims, however, we are dealing with rules that are not principally designed to protect the integrity of the trial itself, but rather to protect the rights of arrested persons not to be compelled by custodial interrogation to incriminate themselves. Accordingly, the "knowing and deliberate waiver" standard has its place in relation to the custodial interrogation itself and is manifested in *Miranda's* requirement that statements made in response to such interrogation are admissible only if preceded by such a waiver. No logical purpose is served by requiring in addition a knowing and deliberate waiver of the right to object at trial to the admission of statements that may have been obtained in violation of *Miranda.*

2. In the instant case, the court of appeals suggested that "cause" justifying relief from the procedural bar of the state rule was shown both because the trial judge failed *sua sponte* to require the State to justify the admission of the confession before admitting it into evidence at trial and because respondent was prejudiced by its admission in the sense that the confession may have affected the verdict.

This analysis is wrong. There is no constitutional obligation on a trial judge to raise the issue of the admissibility of post-arrest statements. "Under our adversary system, once a defendant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial

judges and counsel in our legal system." *Estelle* v. *Williams,* 425 U.S. 501, 512.

As for the fact that the post-arrest statements may have affected the verdict, if that is to be held sufficient "cause" to overcome respondent's procedural default, then the salutory objectives of procedural requirements such as the Florida rule involved here and Rule 12(b)(3) of the Federal Rules of Criminal Procedure will be completely undermined. One of the principal purposes such rules serve is to encourage objections to be made at a time when the commission and investigation of a crime are sufficiently recent that it will be possible for law enforcement officials to find evidentiary substitutes if in fact a confession is suppressed. Another purpose is to insure that the claim for suppression of evidence will itself be determined at a time when memories are relatively fresh and information concerning the circumstances of the government's procurement of the challenged evidence is readily available. These policies are defeated when an objection is first made after trial and often years after the commission of the offense. In such a case, a defendant should be required to show not simply that the evidence was potentially useful to the jury, but that the challenged confession was involuntary and that its admission, because of the unreliability of such confessions, may have contributed to the conviction of an innocent man. See *Jenkins* v. *Delaware,* 395 U.S. 213.

This approach is consistent with the holding of the Court in *Davis* v. *United States, supra,* where the

Court refused to *presume* prejudice in the case of a procedural default regarding a claim of racial discrimination in the selection of a grand jury, but required a showing of actual prejudice. Similarly, here the Court should decline to indulge the *Miranda* presumption of coercion, but should instead condition access to habeas corpus relief upon a showing that respondent's post-arrest statements were involuntary in fact.

3. Indeed, we believe it is appropriate to go somewhat further. Because respondent here seeks extraordinary relief from a reasonable state procedural rule, he should be required to show not only that the confession was involuntary, but that it may have contributed to an erroneous verdict. Our submission is that the test on collateral attack for determining whether a defendant should be relieved of a procedural default of the kind at issue here should not be whether the district court affirmatively called the issue to the attention of the defendant, or whether the evidence may have affected the result, but whether the admission of the evidence may have caused the punishment of an innocent man.

Such an approach insures that the writ of habeas corpus remains available to one who is unjustly confined, while giving effect to the salutary purposes of procedural rules such as the Florida rule at issue here. Moreover, while the writ has been expanded to provide "'a quasi-appellate review function, forcing trial and appellate courts in both the federal and state system to toe the constitutional mark'" (*Stone* v.

Powell, No. 74–1055, decided July 6, 1976, dissenting opinion of Brennan, J., p. 19, quoting *Mackey* v. *United States,* 401 U.S. 667, 687), that consideration is not violated where a defendant fails to call any alleged constitutional violation to the attention of the trial judge although he had been afforded an opportunity to do so.

There is here no claim that the confession was involuntary and no suggestion that an innocent man may have been convicted. Moreover, because the prosecution's case-in-chief was so strong even without respondent's post-arrest statements, respondent had to take the stand if he was to make any defense at all. At that point his statements could have been used to impeach his credibility. Under these circumstances, respondent's lawyer, who made detailed inquiries into the manner in which the statements were obtained, may have simply decided to forgo a formal objection that would have little practical value to the defense. Should it now be held that habeas corpus relief is nevertheless available, there will be little incentive for future defendants in cases such as this to raise the issue at trial.

ARGUMENT

I. THE STANDARD TO BE APPLIED HERE IS NOT WHETHER RESPONDENT "DELIBERATELY BY-PASSED" OR "UNDERSTANDINGLY AND KNOWINGLY" WAIVED HIS OBJECTION TO THE ADMISSION OF THE CONFESSION, BUT WHETHER THERE IS CAUSE TO EXCUSE HIS PROCEDURAL DEFAULT

1. The threshold issue presented here concerns the standard that must be applied in determining whether

respondent is precluded by his procedural default from challenging the admissibility of his confession. The court of appeals held that where, as here, a defendant had been prejudiced by the admission of the challenged evidence, he would not be barred from raising the issue unless there had been a deliberate by-pass or a knowing and intelligent waiver of his objection to the admissibility of the confession. We respectfully submit that this standard is wrong.

In *Davis* v. *United States,* 411 U.S. 223, the defendant had failed prior to trial to challenge the method of selection of the grand jury that indicted him, although Fed. R. Crim. P. 12(b)(2) required that such motions be made prior to trial or they would be deemed waived. The defendant argued, nevertheless, that "because his § 2255 motion alleged deprivation of a fundamental constitutional right," Rule 12(b)(2) was not controlling. "Accordingly, he urge[d] that his collateral attack on his conviction may be precluded only after a hearing in which it is established that he 'deliberately by passed' or 'understandingly and knowingly' waived his claim of unconstitutional grand jury composition" (411 U.S. at 236).

This Court rejected the argument and held that, although the waiver standard relied upon by the defendant might have been appropriate in the absence of a procedural rule like Rule 12(b)(2), in which Congress has specifically provided that such claims must be raised timely or be deemed waived, the explicit provision of the rule took precedence over "a

particular doctrine of waiver [which had been] applied by this Court in interpreting the [habeas corpus] statute" (411 U.S. at 242).

Accordingly, the Court refused to apply the "deliberate by-pass or knowing waiver" standard that had been previously applied in determining the availability of habeas corpus relief as to issues that had not been timely raised or properly preserved (*ibid.*):

> We think it inconceivable that Congress, having in the criminal proceeding foreclosed the raising of a claim such as this after the commencement of trial in the absence of a showing of "cause" for relief from waiver, nonetheless intended to perversely negate the Rule's purpose by permitting an entirely different but much more liberal requirement of waiver in federal habeas proceedings. We believe that the necessary effect of the congressional adoption of Rule 12(b)(2) is to provide that a claim once waived pursuant to that Rule may not later be resurrected, either in the criminal proceedings or in federal habeas, in the absence of the showing of "cause" which the Rule requires. We therefore hold that the waiver standard expressed in Rule 12(b)(2) governs an untimely claim of grand jury discrimination, not only during the criminal proceeding, but also later on collateral review.

When the same issue arose in *Francis* v. *Henderson*, 425 U.S. 536, which involved a belated challenge by a state prisoner to the racial composition of the grand jury in the face of a state procedural bar similar to that of the federal rules, the Court held that "[i]f, as

Davis held, the federal courts must give effect to these important and legitimate concerns [underlying a procedural rule like Fed. R. Crim. P. 12], then surely considerations of comity and federalism require that they give no less effect to the same clear interests when asked to overturn state criminal convictions" (*id.* at 541).

After *Davis* was decided, this Court promulgated and Congress affirmatively approved an amendment to Rule 12 of the Federal Rules of Criminal Procedure (Rule 12(b)(3)) bringing motions to suppress evidence within the category of motions that must be made prior to trial or be deemed waived (416 U.S. 1003; Federal Rules of Criminal Procedure Amendments Act of 1975, Pub. L. 94–64, Section 2, 89 Stat. 370). This action quite plainly makes the construction of Rule 12 in *Davis* applicable equally to petitions for collateral review commenced by federal prisoners who did not timely raise suppression motions. Accordingly, the holding in *Francis* v. *Henderson, supra,* would compel a federal court to give similar preclusive effect to the provisions of a comparable state procedural rule. Significantly, the Florida rule involved here was in fact modeled in part after former Rule 41 of the Federal Rules, which required a motion to suppress illegally seized evidence to be made prior to trial.[3] *Committee Notes,* 33 F.S.A., p. 267 (1975).

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[3] The provisions of former Rule 41 were incorporated in the amendment to Fed. R. Crim. P. 12 discussed above. See *United States* v. *Mauro*, 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991.

Davis and *Francis* thus substantially undermine the support that might otherwise be derived for the court of appeals' decision from an expansive reading of *Fay* v. *Noia*, 372 U.S. 391, and *Henry* v. *Mississippi*, 379 U.S. 443. *Fay* is of course distinguishable from the instant case (and from *Davis* and *Francis*) in that it did not involve a failure by the defendant to comply with a state procedural rule requiring a timely objection to evidence or to some irregularity in the institution of the proceedings; instead, it was concerned with assessing the impact of a defendant's failure to appeal upon the availability of federal habeas corpus. There are significant differences between the two kinds of procedural default. The failure to make a pretrial objection may irretrievably prejudice the prospects both of accurately determining the merits of the objection and, where the objection is found to be meritorious and evidence is excluded, of adducing other probative evidence in lieu of the suppressed evidence (since such other evidence could often be found and presented at the time of trial but will be undiscoverable or lost when a conviction is set aside at a later date). See discussion at pp. 37–40, *infra*. On the other hand, when a timely objection is made and the matter is adjudicated at or before trial, the risk of prejudice is appreciably lessened, and the adverse consequences for the administration of justice from a failure to appeal are correspondingly reduced.

Fay is also distinguishable in terms of the nature of the constitutional claim there under considera-

tion—that the defendant had been convicted of murder solely on the basis of a confession that was involuntary in fact and therefore without probative value. It may well be that federal habeas corpus should be available to review claimed constitutional defects that may have led to the conviction of an innocent person even though a state (or federal) statute or rule would otherwise erect a procedural barrier to consideration of the claim. See pp. 41–43, *infra*; cf. *Stone* v. *Powell*, No. 74–1055, decided July 6, 1976.

Henry is in some ways more directly comparable to the instant case because, although it reached this Court on direct review rather than habeas corpus, it concerned the effect to be given the state rule requiring contemporaneous objection to the admission of evidence alleged to have been illegally seized. Thus, in contrast to *Fay*, both *Henry* and the instant case involve comparable procedural rules, and both involve the use of probative, but arguably excludible, evidence at trial. While *Henry*'s holding (that a state procedural rule could bar direct Supreme Court review when counsel have deliberately by-passed an available objection for tactical reasons) is of limited pertinence to the present case, it seems fair to say that an underlying assumption of both the majority opinion and Mr. Justice Harlan's dissent was that the state procedural rule would not serve to bar federal habeas corpus review (although the dissenters plainly believed that it should). But, of course, this assumption was not a holding in *Henry*, and it is entirely incompatible with

the subsequent development of the law on this point, as reflected by *Davis* and *Francis*.

2. Indeed, we believe that, even without a procedural bar such as Fed. R. Crim. P. 12, there is no sound basis for applying the stringent *Johnson* v. *Zerbst*[4] voluntary waiver standard used by the court of appeals. As Judge Friendly has aptly observed, such a standard was "wholly appropriate" in that case because "[t]he sixth amendment, [as construed by the Court in *Johnson* v. *Zerbst*], required the provision of counsel; none has been provided; therefore the writ should issue unless the defendant had waived his right." Friendly, *Is Innocence Irrelevant? Collateral Attack on Criminal Judgments,* 38 U. Chi. L. Rev. 142, 159 (1970) (hereafter cited as "Friendly"). Judge Friendly continued by noting that similar standards should not be applied to the use at trial of the fruits of improper interrogation or illegal search (*id.* at 159–160):

> The Constitution protects against compelled self-incrimination; thus an incriminating statement made under compulsion cannot be used over timely objection unless before answering the defendant had waived his privilege not to speak. It protects also against unreasonable searches; if there has been a search of a home without a warrant, the fruits thus cannot be used over objection unless the defendant has consented to the search. But it is a serious confusion of thought to transpose this doctrine of substantive law into the courtroom. At that

[4] 304 U.S. 458, 464.

> stage the defendant's constitutional right is to have a full and fair opportunity to raise his claims on trial and appeal and the assistance of counsel in doing so. There is no need to find a "waiver" when the defendant or his counsel has simply failed to raise a point in court, since the state has not deprived him of anything to which he is constitutionally entitled.[5]

The reasoning is apposite here. While the incriminating statement made by respondent under the "compulsion" of custodial interrogation could not have been used at trial in the face of a timely objection, unless the prosecution could demonstrate that before answering respondent had knowingly waived his right to remain silent, his right in his prosecution was simply to have a full and fair opportunity to raise his claims at trial and on appeal and to enjoy the assistance of counsel in doing so. Where, as here, he plainly was afforded such an opportunity by the pertinent state procedural rules and failed to take advantage of it, it cannot reasonably be said that his trial was conducted in such a manner as to deprive him of any right to which he was entitled. Cf. *Estelle* v. *Williams*, 425 U.S. 501.

This distinction between the standards to be applied in assessing the sufficiency of a waiver of the constitutional right itself as compared to the waiver of a

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[5] The implication in this passage that the Constitution might be construed to require a knowing and intelligent waiver to support a consent search was not borne out by this Court's decision in *Schneckloth* v. *Bustamonte*, 412 U.S. 218.

possible trial right to obtain exclusion of evidence is particularly appropriate in the present context, where respondent's claim is that his interrogation denied him the "procedural safeguards" *Miranda* prescribed "to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444. Normally, the privilege against self-incrimination is deemed to be waived unless the defendant refuses to speak because of his fear of self-incrimination. *United States* v. *Kordel*, 397 U.S. 1. While the special nature of custodial interrogation has led to a rule under which a statement made without advice or waiver of *Miranda* rights is potentially inadmissible, the judicially created remedy for *Miranda* violations is simply to permit a defendant to secure exclusion of his statements at trial. It surely does not follow that a defendant and his attorney should be relieved of the necessity for raising the claim when the statement is used against him.

In the present case, however, the Court need not completely accept the foregoing analysis, which we acknowledge is inconsistent with certain language in *Fay* v. *Noia*, *supra*, 372 U.S. at 439–440, in order to decide in the State's favor, because here there is a procedural rule that requires the timely assertion of any objection to the admissibility of evidence, and *Davis* v. *United States*, *supra*, and *Francis* v. *Henderson*, *supra*, make it plain that in such circumstances the strict *Johnson* v. *Zerbst* waiver standard is not applicable.

II. THERE ARE NO SPECIAL CIRCUMSTANCES PRESENT HERE THAT EXCUSE RESPONDENT'S PROCEDURAL DEFAULT

Fla. R. Crim. P. 3.190(i)(2) provides in pertinent part that a motion to suppress a statement or admission "shall be made prior to trial unless opportunity therefor did not exist or the defendant was not aware of the grounds for the motion, but the court in its discretion may entertain the motion or an appropriate objection at the trial." While the rule gives the trial court discretion to entertain a timely objection "at the trial," there is no indication that this discretion extends to a collateral attack on the judgment of conviction. This is so not only because of the wording of Rule 3.190(i), but also because Fla. R. Crim. P. 3.850, which "was adopted from, and is essentially verbatim, § 2255 of Title 28 of the U.S. Code * * *" (*State* v. *Matera*, 266 So. 2d 661, 662), has been construed by the Supreme Court of Florida to preclude a defendant from obtaining collateral relief "[i]f the matter forming the basis of a motion to vacate was known to the defendant at the time of trial * * * whether the matter was litigated at trial * * * or withheld and not litigated at trial" (*id.* at 666).

While this procedural bar appears to be more stringent than Fed. R. Crim. P. 12(f), which permits a district court judge to grant relief from its waiver provisions for "cause", federal courts are not compelled to honor an "airtight" waiver rule of the kind which Florida applies (*Francis* v. *Henderson*, *supra*, 425 U.S. at 538–539). Accordingly, the issue raised is whether there are any special circumstances present

here that would warrant relieving respondent from his procedural default.

Although the court of appeals did not approach the case in this way, it nevertheless cited two considerations that it obviously considered to be sufficient to excuse the default. The first of these was the failure of the trial judge *sua sponte* to question the admissibility of the statements and to require "the prosecution to show they were admisible." The court of appeals reasoned that if the trial judge had done this "appellee would have been on notice as to the waiver of his rights" (A. 17). Second, the court of appeals also found compelling the fact that the respondent was prejudiced by the allegedly erroneous admission of the statements, and it concluded that this too provided a basis for distinguishing *Davis* and relieving respondent from the consequences of his procedural default.

We believe that neither of these considerations constitutes sufficient cause to relieve respondent in a federal habeas corpus proceeding of the consequences that Florida has chosen to attach to a procedural default of this nature.

A. THE TRIAL COURT WAS UNDER NO OBLIGATION, ABSENT A TIMELY OBJECTION, TO COMPEL THE STATE TO SHOW THAT THE POST-ARREST STATEMENTS WERE PROPERLY OBTAINED

There is no dispute here that respondent had ample opportunity to challenge the admissibility of his statements either prior to or at trial and that he was aware, or should have been aware, of the grounds for the motion. The deputy sheriffs who testified

were interrogated specifically by respondent's trial counsel about the warnings that were given and the respondent's response to those warnings. Moreover, defense counsel elicited the fact that respondent was intoxicated at the time of his arrest (see, p. 6, *supra*). Thus, respondent's waiver could not be excused on either of the grounds provided by the Florida procedural rule.

Nor do we believe that a federally created excuse may be constructed on the theory that the trial court was under some affirmative obligation to ask the defendant whether he objected to the admission of the statements. Indeed, any doubt about this issue would seem to have been resolved only last Term in *Estelle* v. *Williams*, *supra*. There, the Chief Justice observed for the Court (425 U.S. at 512):

> Nothing in this record, therefore, warrants a conclusion that respondent was compelled to stand trial in jail garb or that there was sufficient reason to excuse the failure to raise the issue before trial.[9] Nor can the trial judge be faulted for not asking the respondent or his counsel whether he was deliberately going to trial in jail clothes. To impose this requirement suggests that the trial judge operates under the same burden here as he would in a situation in *Johnson* v. *Zerbst*, 304 U.S. [458] (1938), where the issue concerned whether the accused willingly stood trial without the benefit of counsel. Under our adversary system, once a defend-

[9] It is not necessary, if indeed it were possible, for us to decide whether this was a defense tactic or simply indifference. In either case, respondent's silence precludes any suggestion of compulsion.

> ant has the assistance of counsel the vast array of trial decisions, strategic and tactical, which must be made before and during trial rests with the accused and his attorney. Any other approach would rewrite the duties of trial judges and counsel in our legal system.

Accord: *United States* v. *Mitchell*, 540 F. 2d 1163, 1169–1170 (C.A. 3) (Stern, J., concurring).

The court of appeals in the instant case stated, however, that "[t]he trial judge, before receiving the admissions or confessions of a defendant must hold an evidentiary hearing outside the presence of the jury to determine if it was voluntarily made. * * * This is a prerequisite to the introduction of the evidence; and the opportunity to have such a hearing is a pre-requisite to any assertion of waiver because of the defendant's failure to object" (A. 17).

The only authority cited by the court of appeals for its suggestion that there was an affirmative duty on the part of the trial judge himself to question the admissibility of this evidence is *Jackson* v. *Denno*, 378 U.S. 368. That decision will not bear the weight placed upon it by the court of appeals. The case simply had nothing to do with the obligation of a trial judge spontaneously to raise a challenge to the admissibility of a defendant's confession. Rather, it dealt with the quite different question of the proper procedures for adjudicating a coerced confession claim that had been duly raised by the defense.

Moreover, even if *Jackson* were now to be extended by this Court to impose upon the trial judge an obliga-

tion to raise *sua sponte* the isue of the voluntariness of a confession, it would by no means follow that such an obligation should extend to possible *Miranda* objections to a confession not attacked as involuntary in fact. In this case respondent has not challenged the voluntariness of his statements under the traditional standard, and we are aware of nothing in the record to suggest that his confession was involuntary under that standard.[6] Moreover, the isue of voluntariness is not coterminous with the issue whether *Miranda* has been complied with; a determination that a confession was voluntary will not justify its admission if *Miranda* was not complied with. See 384 U.S. 457; *Johnson* v. *New Jersey*, 384 U.S. 719, 728–730. Accordingly, whatever may be the respective obligations of court and counsel with respect to voluntariness issues of the kind presented in *Jackson*, the law on the point affords no basis for relieving a defendant of the effects of a waiver arising from a failure to raise a *Miranda* claim.

B. THE FACT THAT ADMISSION OF THE POST-ARREST STATEMENTS MAY HAVE AFFECTED THE VERDICT DOES NOT JUSTIFY RELIEVING RESPONDENT OF HIS PROCEDURAL DEFAULT

In *Davis* v. *United States*, *supra*, the Court rejected the argument of the petitioner, and the view of the

[6] The fact that respondent may have been intoxicated at the time he made the statements in question would not normally affect their admissibility on voluntariness grounds. See generally Annotation. *Confession While Intoxicated*, 69 A.L.R. 2d 361 (1960); *United States* v. *Martin*, 434 F.2d 275 (C.A. 5); but cf. *Intoxicted Confessions: A New Haven in Miranda?;* 20 Stan. L. Rev. 1269 (1968).

dissenting Justices (411 U.S. at 255), that the concept of "cause" sufficient to provide relief from a procedural default should incorporate the *Johnson* v. *Zerbst* voluntary and knowing waiver standard. Instead, it held that the district court had properly concluded that no "cause" was shown to grant relief from the waiver provisions of Rule 12(f) where the facts underlying the claim of illegal composition of the grand jury were a matter of public record and could easily have been ascertained prior to trial, and where no specific prejudice was shown to the defendant as a result of the alleged illegal composition of the grand jury that had indicted him.

The court of appeals here cited the language, approved in *Davis,* that " 'it is entirely proper to take absence of prejudice into account in determining whether a sufficient showing has been made to warrant relief from the effect of the Rule' " (411 U.S. at 244, quoting from *Shotwell Mfg. Co.* v. *United States,* 371 U.S. 341, 363) and concluded that the present case was distinguishable from *Davis* on this point. This was so because "in a case such as the present one, involving the admissibility of a confession or incriminating statement, prejudice to the defendant is inherent" (A. 15).

We submit that the court of appeals misread and misapplied the holding in *Davis.* Applied in the federal context, the court's statement means that the waiver provision of Fed. R. Crim. P. 12(f) has no application to claims regarding the admissibility of evidence unless the admission of the evidence was

harmless (in which event it would not be necessary to review the merits of the claim in the first place). We believe that such a reading of Rule 12(f), which would render wholly meaningless the mandate of Rule 12(b)(3) that evidentiary suppression motions be made before trial, is plainly erroneous and contrary to the obvious and salutory purpose of provisions such as Rule 12 of the Federal Rules and Rule 3.190(i) of the Florida rules. See *United States* v. *Mauro,* 507 F. 2d 802 (C.A. 2), certiorari denied, 420 U.S. 991.

Furthermore, the analysis in *Davis* of the extent to which "prejudice" must be taken into account as *a factor* in determining whether a habeas corpus petitioner should be relieved of the consequences of his procedural default essentially supports the position we urge here. The claim in *Davis* was one of racial discrimination against Negroes in the selection of the grand jury that indicted a Negro defendant. Although there are other interests at stake where a claim involving jury discrimination is made, the principal direct prejudice to the defendant is the possibility that an indictment or conviction will be based on racial prejudice. *Peters* v. *Kiff,* 407 U.S. 493, 498–499. While it is clear that not every indictment returned by a grand jury, or conviction by a petit jury, from which Negroes are excluded is motivated by racial prejudice, considerations of policy justify presuming such prejudice where a timely objection is made. Where, however, there has been a procedural default, and the issue is raised for the first time in a collateral proceeding, *Davis* held that

the absence of a showing of actual prejudice (*i.e.*, actual racial discrimination) justified the denial of relief from the procedural default. As the Court observed in *Davis* (411 U.S. at 245):

> The presumption of prejudice which supports the existence of the right is not inconsistent with a holding that actual prejudice must be shown in order to obtain relief from a statutorily provided waiver for failure to assert it in a timely manner.

Moreover, it is apparent that the "actual prejudice" to which the Court in *Davis* alluded as a factor justifying relief from the procedural default, reflects the kind of occurrence that would raise a serious due process issue going to basic considerations of fairness in the criminal process. See *Peters* v. *Kiff*, *supra*, 407 U.S. at 501.[7]

The analysis employed in *Davis* leads to the conclusion here that the respondent has not shown cause to be relieved of his procedural default. The error about which he complains is the admission of his statements although they may have been obtained without compliance with the procedural rules prescribed in *Miranda*. "[T]hese procedural safeguards [are] not themselves rights protected by the Consti-

[7] This was, in fact, the "actual prejudice" that the district court judge in *Davis* found to be absent when he observed that the defendant was indicted with two white accomplices, that the government's case was a strong one, and that "[t]he government did not require the assistance of racial prejudice in order to obtain an indictment against petitioner, and indeed petitioner does not contend that any such prejudice existed" (*Davis* v. *United States*, *supra*, No. 71-6481, October Term 1972, Sup. Ct. App. 25).

tution but were instead measures to insure that the right against compulsory self-incrimination was protected." *Michigan* v. *Tucker*, 417 U.S. 433, 444. Without abandoning the premise that a statement voluntarily made is admissible at trial, the Court in *Miranda* instituted a presumption of involuntariness where the suspect makes a statement without first having been fully advised of and having knowingly waived his right to counsel and his right to remain silent.

Miranda's presumption of involuntariness is analogous to the presumption of prejudice indulged when racial discrimination has infected the composition of a grand jury. And just as every indictment returned by an improperly constituted grand jury is not necessarily the product of actual racial bias, so every statement obtained without procuring a proper *Miranda* waiver is not necessarily involuntary or unreliable in fact. See *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 729–730. The *Miranda* presumption simply reflected the Court's unwillingness, for reasons of judicial policy,[8] to continue the case-by-case analysis required by the traditional voluntariness test, particularly in view of its general "finding" regarding the practices commonly employed in custodial interrogation (see 384 U.S. at 454–455).

Accordingly, where a timely objection is made, "the presumption of prejudice" (*i.e.*, that the statement is

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[8] See Kamisar, *A Dissent From The Miranda Dissents: Some Comments On The "New" Fifth Amendment And The Old "Voluntariness" Test*, 65 Mich. L. Rev. 59, 99–104 (1966).

involuntary) that "supports the existence of the right" to the procedure mandated in *Miranda* will suffice to warrant the exclusion of a confession not obtained in conformity with *Miranda*. Here, however, there was no timely objection, and just as the Court in *Davis* was not prepared to accept the "presumption of prejudice" that supports the procedural right there at issue (a properly selected grand jury), so here the Court should not accept the "presumption of prejudice" that supports the procedural rights prescribed by *Miranda*. In short, at the very minimum, the prejudice that a defendant should be required to show to obtain relief from the waiver imposed by the state rule is that his confession was in fact involuntary.

This analysis is also supported by the holding in *Jenkins* v. *Delaware*, 395 U.S. 213, which involved the issue whether a defendant who had been convicted before *Miranda* was decided, but whose conviction was reversed on other grounds after the decision in *Miranda*, could object on *Miranda* grounds to the admission of a post-arrest statement at his retrial. Although the Court had previously held that *Miranda* would be applied to all trials commenced after the date of the decision (*Johnson* v. *New Jersey*, *supra*), it distinguished the retrial at issue in *Jenkins* from the situation with which it had dealt in *Johnson*.

After observing that, "in an effort to extend the protection of *Miranda* to as many defendants as was consistent with society's legitimate concern that convictions already validly obtained not be needlessly aborted," *Johnson* held *Miranda* applicable only to

trials commenced after the date *Miranda* was decided (395 U.S. at 219). The Court continued (*id.* at 219–220):

> Implicit in this choice was the assumption that, with few exceptions, the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial that no undue burden would be imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*.

However, this critical "assumption" is not operative at a retrial, which may take place many months, if not years, after the crime had been committed. Accordingly, the Court continued (395 U.S. at 220):

> This same concern for the justifiable reliance of law enforcement officials upon pre-*Miranda* standards militates against applying *Miranda* to retrials, which would place a much heavier burden upon prosecutors to compensate for the inadmissibility of incriminating statements obtained and admitted into evidence pursuant to practices not previously proscribed. See, *e.g.*, *State* v. *Vigliano, supra; People* v. *Sayers,* 22 N.Y. 2d 571, 240 N.E. 2d 540 (1968); Comment, The Applicability of *Miranda* to Retrials, 116 U. Pa. L. Rev. 316, 324–325 (1967). As we stated in *Stovall,* "[I]nquiry would be handicapped by the unavailability of witnesses and dim memories." 388 U.S., at 300. The burden would be particularly onerous where an investigation was closed years prior to a retrial because law enforcement officials relied in good faith upon a

> strongly incriminating statement, admissible at the first trial, to provide the cornerstone of the prosecution's case.

The same considerations are present where a defendant who has not made a timely objection at trial commences a habeas corpus proceeding after his conviction has become final. The law enforcement officers, who may have relied on his unchallenged confession as "the cornerstone" of their case, will be faced with the "onerous" burden of attempting to reopen an investigation long since closed in an effort to rehabilitate the case. Conversely, if a timely objection had been made and sustained, at a time when "the commission and investigation of a crime would be sufficiently proximate to the commencement of the defendant's trial," then "no undue burden would [have] be[en] imposed upon prosecuting authorities by requiring them to find evidentiary substitutes for statements obtained in violation of the constitutional protections afforded by *Miranda*." Indeed, this is one of the principal policies underlying procedural rules like Fla. R. Crim. P. 3.190(i). Another reason for the rule is the difficulty of meeting a claim of noncompliance with *Miranda* years after the conviction.[9] As Judge Friendly has observed (Friendly, *supra*, 38 U. Chi. L. Rev. at 147):

> The longer the delay, the less the reliability of the determination of any factual issue giving

[9] These are not the only considerations that justify a requirement of timely objection. See Chief Judge Kaufman's thoughtful opinion in *United States* v. *Mauro*, *supra*, 507 F. 2d at 805–806.

> rise to the attack. It is chimerical to suppose that police officers can remember what warnings they gave a particular suspect ten years ago, although the prisoner will claim to remember very well. Moreover, although successful attack usually entitles the prisoner only to a retrial, a long delay makes this a matter of theory only.[10]

This is not to say that a defendant who failed to make a timely objection to the admissibility of a confession is necessarily to be left without recourse if he can establish actual prejudice—that is, that the confession obtained was truly involuntary. As the Court observed in *Jenkins*, the defendant there could still "invoke a 'substantive test of voluntariness which, because of the persistence of abusive practices, has become increasingly meticulous . . ., [taking] specific account of the failure to advise the accused of his privilege against self-incrimination or to allow him access to outside assistance.' 384 U.S., at 730. As a result, not applying *Miranda* to retrials will not preclude the invocation of 'the same safeguards as part of an involuntariness claim.' *Ibid.*" (395 U.S. at 221).

Here, of course, the respondent has not alleged that his confession was involuntary. Rather he seeks the benefit of the "presumption" of involuntariness that *Miranda* assumes. But *Davis* teaches that having failed to make his claim as required by the applicable

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[10] This problem may be alleviated to some extent by Rule 9(a) of the new Section 2254 rules.

rule, he is not entitled to the benefit of that presumption in a collateral attack on his conviction. Having failed to show "actual prejudice," in the sense in which *Davis* used the term, respondent is not entitled to relief from the consequences of his procedural default.

III. THE CRITICAL TEST IN DETERMINING WHETHER A HABEAS CORPUS PETITIONER SHOULD BE RELIEVED OF HIS PROCEDURAL DEFAULT IS WHETHER THE ALLEGED ERROR COULD HAVE CAUSED THE CONVICTION OF AN INNOCENT MAN

Although the Court need go no further in order to decide this case, we wish to make it clear, in light of what we have said above, that a showing of actual prejudice of the kind we have discussed is in our view a necessary but not a sufficient precondition to obtain relief from a procedural default of the kind here at issue. A showing that the confession was involuntary in the traditional sense should be accompanied by a showing that its admission may have contributed to an erroneous verdict.

All of the policy reasons outlined in *Jenkins* and discussed above for denying a defendant the benefit of the *Miranda* holding months or years after the offense has been committed and the trial has taken place apply with equal force where a defendant raises for the first time on collateral attack a claim that his confession was involuntary in fact. Because, however, the reliability of involuntary confessions is always suspect, habeas corpus relief should be available if the

admission of such an involuntary confession "could have caused the punishment of an innocent man," as was the case in *Fay* v. *Noia*, *supra*. See Friendly, *supra*, 38 U. Chi. L. Rev. at 157, n. 81. As Judge Friendly wrote (*id.* at 163–164):

> In a case where the prosecution had no other substantial evidence, as, for example, when identification testimony was weak or conflicting and there was nothing else, I would allow collateral attack regardless of what happened in the original proceedings. Such a case fits the formula that considerations of finality should not keep a possibly innocent man in jail. I would take a contrary view where the state had so much other evidence, even though some of this was obtained as a result of the confession, as to eliminate any reasonable doubt of guilt.

Here, of course, there is no claim that the confession was truly involuntary, but only that the respondent was not able to understand his *Miranda* warnings. To quote again from Judge Friendly (38 U. Chi. L. Rev. at 163):

> The mere failure to administer *Miranda* warnings in on-the-scene questioning creates little risk of unreliability, and the deterrent value of permitting collateral attack goes beyond the point of diminishing returns for the same reasons developed in Professor Amsterdam's discussion of search and seizure. I would take the same view of collateral attack based on claims of lack of full warnings or voluntary waiver with respect to station-house

> questioning where there is no indication of the use of methods that might cast doubt on the reliability of the answers.[11]

Indeed, quite apart from any question of waiver and procedural default, many of the same policies that led this Court in *Stone* v. *Powell*, *supra*, to conclude that habeas corpus should not be available to consider Fourth Amendment suppression claims when the defendant has had a full and fair opportunity to litigate those claims at trial and on direct appeal call for the conclusion that habeas corpus also ought not extend to *Miranda* claims.

The inappropriateness of extending habeas corpus to encompass *Miranda* claims such as respondent's is highlighted by the particular factual context of this case, because respondent's post-arrest statements, having not been found involuntary, would necessarily have come to the attention of the jury even if the statements had, on timely motion, been initially sup-

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[11] In *Johnson* v. *New Jersey*, *supra*, 384 U.S. at 730, the Court took a similar view regarding the relationship of *Miranda* to the reliability of the confession. There Chief Justice Warren stated: "Thus while *Escobedo* and *Miranda* guard against the possibility of unreliable statements in every instance of in-custody interrogation, they encompass situations in which the danger is not necessarily as great as when the accused is subjected to overt and obvious coercion." See also *Harris* v. *New York*, 401 U.S. 222, 224. While here the respondent was intoxicated, "it is only where the intoxication is produced by a person desirous of obtaining a confession that its trustworthiness becomes really doubtful." 3 Wigmore, *Evidence*, § 841, p. 282 (3d ed. 1940). Accordingly, there is no per se exclusionary rule based on the unreliability of statements made by one who is intoxicated. Annotation, *Confession While Intoxicated*, 69 A.L.R. 2d 361 (1960).

pressed. This is so because, quite apart from respondent's in-custody statements, the State had a very strong case that respondent could have overcome only by taking the stand and explaining his version of the shooting. But once he took the stand, his statements could have been used to challenge his credibility. *Harris* v. *New York*, 401 U.S. 222; *Oregon* v. *Hass*, 420 U.S. 714. Thus, the evidence, without the confession, showed that Willie Gilbert was shot within ten feet of the door to respondent's home with a shotgun that belonged to respondent, and it further showed that *prior* to his arrest both respondent and his wife had told the deputy sheriff that he had shot Gilbert. Moreover, no evidence was found to indicate that Gilbert was carrying any weapons at the time, and the testimony of respondent's wife was insufficient, because of her limited opportunity for observation, to show that respondent acted in self-defense.

Under these circumstances, knowing that he would have to put respondent on the stand in order to establish some defense and that the post-arrest statements could then be used to impeach respondent's credibility, respondent's counsel may simply have chosen not to make a pointless challenge to the admissibility of the post-arrest statements. We do not suggest that he did so with the thought of laying the groundwork for a collateral attack in the event of a conviction. But if the Court were now to hold that a collateral attack is proper in these circumstances, there would be no incentive whatever for a defense attorney, in a

case such as this, to raise his claim in a timely fashion. In fact, there would be considerable incentive to postpone the claim to post-conviction preceedings, thereby securing a virtually automatic second trial in the event the first trial results in conviction. This is particularly true because it would usually be difficult, if not impossible, to show that the failure to object at trial was a deliberate tactical choice.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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